Chapman Law Review

Volume 23
Issue 1 *Symposium: A Fifty-Year Retrospective on Major Laws of the 91st Congress*

Article 1

Winter 6-1-2020

NEPA at 50: Standing Tall

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CHAPMAN LAW REVIEW

Citation: Professor Denis Binder, *NEPA at 50: Standing Tall*, 23 CHAP. L. REV. 1 (2020).

NEPA at 50: Standing Tall©

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I. INTRODUCTION

Richard Nixon's Presidency collapsed in infamy on August 8, 1974. He escaped impeachment only by resigning, but his environmental legacy survives.

Lost in discussions of President Nixon's six and a half-year presidency is that he was the most protective president of the environment since President Theodore Roosevelt. He may or may not have privately believed in the environment,[1] but he recognized the growing public concern for the environment.[2]

The President visited Santa Barbara on March 21, 1969, after the Union Oil blowout on Platform A.[3] He said:

> What is involved here, and it is sad that it is necessary that Santa Barbara has to be the example that had to bring this to the attention of the American people, but what is involved is something much bigger than Santa Barbara; what is involved is the use of our resources of the sea and the land in a more effective way and with more concern for preserving the beauty and the natural resources that are so important to any kind of society that we want for the future. I don't think we have paid enough attention to this. . . . [W]e are going to do a better job than we have done in the past.[4]

He challenged America in his 1970 State of the Union Address: "The great question of the seventies is, shall we

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1 Reports are that he privately scoffed at environmental protection, but understood the political benefits of supporting environmental legislation. Politicians often say different things in public than in private. President Nixon is reported to have said to Henry Ford II in a 1971 meeting that environmentalists wanted to "go back and live like a bunch of damned animals." TRANSCRIPT #7: PART OF A CONVERSATION AMONG PRESIDENT NIXON, LIDE ANTHONY IACOCCA, HENRY FORD II, RONALD L. ZIEGLER, AND JOHN D. EHRLICHMAN IN THE OVAL OFFICE BETWEEN 11:08 AM AND 11:43 AM ON APRIL 27, 1971, at 12, (Richard Nixon Presidential Library & Museum, White House Tapes, Conv. No. 488-15 #7, rev. May 2004), http://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/complete/airbag_488-15.pdf [http://perma.cc/B5KM-7K9S]. He added, "They're a group of people that aren't one really damn bit interested in safety or clean air. What they're interested in is destroying the system. They're enemies of the system." *Nixon tapes hinted at rapport with Ford, Iacocca*, AUTOMOTIVE NEWS (May 2, 1994, 12:00 AM), http://www.autonews.com/article/19940502/ANA/405020728/0/search [http://perma.cc/E5C3-2KYB].

2 President Nixon was far from alone in pushing for environmental litigation. Senators Gaylord Nelson (D., Wis.), Henry "Scoop" Jackson (D., Wash.), and Edmund Muskie (D., Me.) led the way in the Senate for environmental legislation and Representative John Dingell (D., Mich.) in the House. *See, e.g.*, *Gaylord Nelson*, WILDERNESS SOC'Y, http://www.wilderness.org/articles/article/gaylord-nelson [http://perma.cc/5KS2-9444] (last visited Nov. 18, 2019); *Henry "Scoop" Jackson*, UNITED STATES SENATE, http://www.senate.gov/artandhistory/history/minute/Henry_Scoop_Jackson.htm [http://perma.cc/C5JN-TZMX] (last visited Nov. 18, 2019); *Muskie, Edmund Sixtus*, BIOGRAPHICAL DIRECTORY OF UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001121 [http://perma.cc/TUR5-S4L4] (last visited Nov. 18, 2019).

3 Remarks Following Inspection of Oil Damage at Santa Barbara Beach, 1969 PUB. PAPERS 233, 233 (Mar. 21, 1969).

4 *Id.* at 234–35.

surrender to our surroundings, or shall we make our peace with nature and begin to make reparations for the damage we have done to our air, to our land, and to our water?"[5]

Environmental statutes enacted or expanded upon during the Nixon Administration include: the Water Pollution Control Act ("Clean Water Act"),[6] Clean Air Act,[7] Marine Mammal Protection Act,[8] the Ports and Waterways Safety Act,[9] the Marine Protection, Research, and Sanctuaries Act,[10] Coastal Zone Management Act,[11] the Endangered Species Act,[12] and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[13] Moreover, the National Oceanic and Atmospheric Administration ("NOAA") was established during his administration.[14]

President Nixon stopped the Cross Florida Barge Canal on January 19, 1971.[15] The canal would bisect Florida, running from Jacksonville on the Atlantic to Yankeetown, north of Tampa on the Gulf.[16] The canal would be 107 miles long, twelve feet deep, 150 feet wide, and destroy the Ocklawaha River.[17] The original purpose was to protect American shipping from German U-Boats during World War II, although the idea goes back to the Spanish.[18] The President's statement in halting construction of the canal revealed he was acting to prevent potentially serious environmental damage:

> The step I have taken today will prevent a past mistake from causing permanent damage. But more important, we must assure that in the future we take not only full but also timely account of the

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5 Annual Message to Congress on the State of the Union, 1970 PUB. PAPERS 8, 12 (Jan. 22, 1970).

6 Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012).

7 Clean Air Amendments of 1970, 42 U.S.C. §§ 7407–7642 (2012).

8 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2012).

9 Ports and Waterways Safety Act, 33 U.S.C. §§ 1221–1227 (2012) (repealed 2018).

10 Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431–1447f (2012), 33 U.S.C. §§ 1401–1445, 2801–2805 (2012).

11 Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2012).

12 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

13 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012).

14 *Our History*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.noaa.gov/our-history [http://perma.cc/2RS7-7J3Z] (last visited Oct. 24, 2019) (NOAA was established in 1970 as an agency within the Department of Commerce).

15 *See* Statement About Halting Construction of the Cross Florida Barge Canal, 1971 PUB. PAPERS 43, 44 (Jan. 19, 1971); Robert B. Semple, Jr., *President Blocks Canal in Florida*, N.Y. TIMES (Jan. 20, 1971), http://www.nytimes.com/1971/01/20/archives/president-blocks-canal-in-florida-halts-project-to-bar-harm-to.html [http://perma.cc/KC76-FEK8].

16 Ben Brotemarkle, *Canal Idea Hung on, Finally Failed*, FLA. FRONTIERS (Nov. 17, 2015), http://myfloridahistory.org/frontiers/article/95 [http://perma.cc/3J3J-8JQN].

17 Semple, *supra* note 15.

18 *History of the Cross Florida Greenway*, FLA. ST. PARKS, http://www.floridastateparks.org/learn/history-cross-florida-greenway [http://perma.cc/E3VR-3XEC] (last visited Oct. 24, 2019).

> environmental impact of such projects, so that instead of merely halting the damage, we prevent it.[19]

The canal was about a third complete when halted.[20] The right of way is now the Marjorie Harris Carr Cross Florida Greenway, named for the opponent of the canal.[21]

The focus of this Article is the National Environmental Policy Act of 1969 ("NEPA"),[22] one of the most significant acts of a bipartisan consensus of a Republican President and Democratic Congress to protect the environment.

President Nixon created the Council on Environmental Quality ("CEQ") in 1969, which was formally established by NEPA.[23] The Environmental Protection Agency came into effect on December 2, 1970.[24]

The post-World War II period hustled in an era of economic growth and development after a decade and a half of the Great Depression and World War II. Victory unleashed pent up consumer demand in the only great industrial society not leveled by the war.[25]

The boom was great for the economy—but less so for the environment. Emphasis was on the quantity of life—less so the quality. Highways devoured land and split communities. The burgeoning suburbs consumed open space and green lands.[26] Rivers were diverted and polluted. The air was poisoned, and toxins were entering the air, soil, and water.[27]

A classic example of the environmental disregard was the Los Angeles Department of Water Policy's proposed diversion of waters from Mono Lake to its existing Owens Valley diversion.[28] California's Water Board decision said:

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19 Semple, *supra* note 15. *See generally* STEVEN NOLL & DAVID TEGEDER, DITCH OF DREAMS: THE CROSS FLORIDA BARGE CANAL AND THE STRUGGLE FOR FLORIDA'S FUTURE (2009).

20 *See* Brotemarkle, *supra* note 16.

21 *History of the Cross Florida Greenway*, *supra* note 18.

22 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

23 *Id*. § 4342.

24 *EPA History*, ENVTL. PROTECTION AGENCY, http://www.epa.gov/history [http://perma.cc/VD5L-7W32] (last visited Oct. 26, 2019).

25 *See The Rise of American Consumerism*, PBS SOCAL, http://www.pbs.org/wgbh/americanexperience/features/tupperware-consumer/ [http://perma.cc/89BH-JH63] (last visited Oct. 26, 2019).

26 *See* Meir Rinde, *Richard Nixon and the Rise of American Environmentalism*, DISTILLATIONS (June 2, 2017), http://www.sciencehistory.org/distillations/richard-nixon-and-the-rise-of-american-environmentalism [http://perma.cc/8GUX-JAET].

27 *See* Marc Lallanilla, *The History of the Green Movement*, THOUGHTCO (Feb. 5, 2018), http://www.thoughtco.com/what-is-the-green-movement-1708810 [http://perma.cc/4XS4-CV98]. A common way of disposing of pollution was by discharging it into a body of water, i.e. pollution control by dilution.

28 *See* Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cty., 658 P.2d 709, 711 (Cal. 1983).

> [I]t is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently *nothing that this office can do to prevent it*. . . . This office . . . has *no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin*.[29]

The late 1960s became a time of environmental awakening with four catalysts spurring the environmental movement: Rachel Carson in 1962, with her book, *Silent Spring*, engendered widespread concerns over chemicals in the environment;[30] the Santa Barbara oil spill on January 28, 1969, received national attention;[31] Los Angelinos were suffocating in smog;[32] and the Cuyahoga River caught on fire as it flowed through Cleveland on June 22, 1969.[33]

The 1970s became the Decade of the Environment. The decade began on January 1, 1970, with the enactment of the National Environmental Policy Act of 1969.[34] April 22, 1970, was the inaugural Earth Day.[35] President Nixon actively pushed NEPA and the Endangered Species Act, and he endorsed Earth Day.

The Decade of the Environment differed from the earlier twentieth century Conservation Era. Three important statutes enacted in the 1960s—the Wilderness Act,[36] the National Historic Preservation Act of 1966,[37] and the Wild and Scenic

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29 *Id.* at 714. We now know from the public trust doctrine of the Mono Lake litigation in this case that the diversion was an environmental disaster. The Atomic Energy Commission consistently argued prior to the enactment of NEPA "that it had no statutory authority to concern itself with the adverse environmental effects of its actions." Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1972). Similarly, in a Federal Power Commission consideration of a proposed pump storage plant at Storm King Mountain in New York on the Hudson River, the FPC's opinion said:

> Just as the mountain has swallowed the scar of the highway, the intrusive railroad structure and fills, and tolerates both the barges and scows which pass by it and the thoughtless humans who visit it without seeing it, so it will swallow the structures which will serve the needs of people for electric power.

Consol. Edison Co. of N.Y., 44 FPC 350, 384 (1970), *aff'd*, Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463, 470 (2d Cir. 1971).

30 RACHEL CARSON, SILENT SPRING (1962); *see also* RACHEL CARSON, THE SEA AROUND US (rev. ed. 1961).

31 *See* ROBERT EASTON, BLACK TIDE (1972); LEE DYE, BLOWOUT AT PLATFORM A (1971).

32 I remember flying through LAX at 2:00 PM in the mid-1970s, looking out the window, and seeing a beautiful orange "sunset." It was, of course, smog.

33 Check out Randy Newman's song, *Burn On*. RANDY NEWMAN, BURN ON (Reprise Records 1972).

34 National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012).

35 *The History of Earth Day*, EARTH DAY NETWORK, http://www.earthday.org/about/the-history-of-earth-day/ [http://perma.cc/JDF3-ZJMY] (last visited Oct. 26, 2019).

36 Wilderness Act, 16 U.S.C. §§ 1131–1136 (2012).

37 National Historic Preservation Act, 16 U.S.C. § 470 (2012) (repealed 2014).

Rivers Act[38]—reflect the twentieth century conservation movement of creating national forests, parks, and monuments, as well as urban parks, to preserve and enjoy the natural resources.[39] The Wilderness Act converted forest lands susceptible to development into wilderness areas to be preserved, while the Wild and Scenic Rivers Act preserved free flowing sections of rivers.[40]

The environmental statutes of the Decade of the Environment have a different purpose. They are intended not only to prevent further degradation and pollution, but also to reclaim, restore, and bring back.

NEPA is different in its ambit from the other conservation and environmental statutes. Their provisions may be comprehensive, but they are all regulatory statutes directed at specific problems, such as air pollution, water pollution, oil pollution, toxic contamination, and species preservation.[41] NEPA is the only environmental statute that covers the broad ambit of all environmental issues. Since the "environment" often includes a wide variety of land use issues, its coverage is equally broad, as long as federal action is involved.

NEPA is broad and comprehensive in its application to any major federal action significantly affecting the quality of the human environment. The statute is not limited to federal programs. It covers any environmental or land use issue as long as federal action is involved, whether it be environmental, land use planning, natural resources, or federal lands.[42] The federal action could be a structure or project, permit, license, land exchange,[43] lease, or financing.[44] It covers airport expansions,[45] highways,[46] dams,[47] bridges,[48] post offices,[49] pipelines,

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38 Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2012).

39 The twentieth century ushered in the City Beautiful Movement, President Theodore Roosevelt, and the Conservation Movement. *See Theodore Roosevelt and Conservation*, NAT'L PARK SERV., http://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm [http://perma.cc/GM7Z-YWTP] (last updated Nov. 16, 2017).

40 *See* 16 U.S.C. §§ 1131–1136; 16 U.S.C. §§ 1271–1287.

41 *See, e.g.*, Clean Air Amendments of 1970, 42 U.S.C. §§ 7407–7642 (2012); Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012).

42 The federal government owns 28% of United States land, in addition to 2% controlled by the Defense Department. Much of the government's land ownership is in the West, such as 79.6% of Nevada and 61.3% of Alaska. CAROL HARDY VINCENT, LAURA A. HANSON & CARLA N. ARGUETA, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2017).

43 *See, e.g.*, Gettysburg Battlefield Pres. Ass'n v. Gettysburg Coll., 799 F. Supp. 1571, 1578–79 (M.D. Pa. 1992).

44 *See* Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935, 937–38 (5th Cir. 1982) (low-income housing).

45 *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991).

46 *See* Fla. Keys Citizens Coal., Inc. v. U.S. Army Corps of Eng'rs, 374 F. Supp. 2d 1116, 1141–42 (S.D. Fla. 2005).

transmission lines,[50] mass transit,[51] jails,[52] military projects,[53] group homes, low-income housing,[54] oil and gas leasing,[55] and the inspection process for horse slaughtering.[56] It can apply to the action of a state or private party, as long as federal action is involved, but not to purely private or state action.

As we look at the first half-century of NEPA to establish where we are today, we will also look at a few of the more interesting cases that are often overlooked in the larger picture.[57]

II. THE PRECIS: THE STATUTE

Congress often enacts statutes with broad, glowing, flowery preambles, followed by narrower substantive provisions. NEPA is no exception. NEPA's preamble states:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[58]

Section 101(a) provides:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[59]

Section 101(c) states "The Congress recognizes that each person should enjoy a healthful environment and that each

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47 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

48 *See* Sierra Club v. Hassell, 636 F.2d 1095, 1097–98 (5th Cir. 1981).

49 *See* Chelsea Neighborhood Ass'ns v. U.S. Postal Serv., 516 F.2d 378, 386 (2d Cir. 1975).

50 *See* Greene Cty. Planning Bd. v. Fed. Power Comm'n, 455 F.2d 412, 422 (2d Cir. 1972); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 270–71 (8th Cir. 1980).

51 *See, e.g.*, Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99, 102, 116 (N.D. Ga. 1975); Lakes & Parks All. v. Fed. Transit Admin., 928 F.3d 759, 761 (8th Cir. 2019).

52 *See, e.g.*, Ely v. Velde, 497 F.2d 252, 252–54, 256 (4th Cir. 1974); Hanly v. Kleindienst, 471 F.2d 823, 826–27 (2d Cir. 1972).

53 *See* Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984).

54 *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 223, 228 (1980); Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 90, 92–93 (2d Cir. 1975).

55 *See* Sierra Club v. Peterson, 717 F.2d 1409, 1410, 1412 (D.C. Cir. 1983).

56 *See* Humane Soc'y of U.S. v. Johanns, 520 F. Supp. 2d 8, 27 (D.D.C. 2007).

57 For a comprehensive look at NEPA, see ALBERTO M. FERLO, ET AL., THE NEPA LITIGATION GUIDE (2d ed. 2012).

58 National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012).

59 *Id.* § 4331(a).

person has a responsibility to contribute to the preservation and enhancement of the environment."[60]

NEPA is a simple statute—deceptively simple. The critical Section 102 is only 455 words in plain English.[61] The wording has not been amended in its fifty years of existence.[62]

The CEQ refers to NEPA as "our basic national charter for protection of the environment."[63] Some use the words "Magna Carta" for the environment, but it is not a "green Magna Carta."[64]

The problem with these sections is that they are purely precatory. They provide no penalties or other remedies for violations, no judicial review, no private cause of action,[65] no standards, factors or guidelines, and no weighing or balancing. Professor Caldwell wrote: "The goals and principles declared in section 101 have been treated as noble rhetoric having little practical significance."[66] The operative provision is Section 102, which creates the environmental impact statement ("EIS"), the NEPA Statement.

The following outlines the various aspects and processes involved in NEPA.

A. The NEPA Statement

Section 102 of NEPA:

> [D]irects that, to the fullest extent possible . . . all agencies of the Federal Government shall—
>
> > (C) include in every recommendation or report on proposals for legislation and other major Federal actions[67] significantly

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60 *Id.* § 4331(c).

61 Congress has often enacted statutes with hundreds, if not thousands, of pages.

62 The author understands in completing this article that the Council on Environmental Quality has proposed amendments to its regulations that will–if adopted, survive litigation, and not be overturned by Congress–narrow the scope of NEPA. For a discussion of the proposed changes, see James McElfish, Jr., *Practitioners Guide to the Proposed NEPA Regulations*, ELI (Feb. 2020), http://www.eli.org/sites/default/files/eli-pubs/practioners-guide-proposed-nepa-regulations-2020.pdf [http://perma.cc/76BS-F2RU].

63 40 C.F.R. § 1500.1(a) (2018).

64 *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 193–94 (D.C. Cir. 1991).

65 Many of the federal environmental statutes contain citizen suit provisions, letting private parties act as private "attorney generals" on enforcing the laws if the federal or state officials fail to do so. *See Citizen Suit Provisions in Environmental Law*, ENVTL. RTS. DATABASE, http://environmentalrightsdatabase.org/citizen-suit-provisions-in-environmental-law/ [http://perma.cc/8DX2-TTF9].

66 Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205 (1998) (footnote omitted). Professor Caldwell could be considered the father of NEPA.

67 A major federal action can include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies," and "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a).

> affecting the quality of the human environment,[68] a detailed statement by the responsible official on—
>
> > (i) the environmental impact of the proposed action,
> >
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> >
> > (iii) alternatives to the proposed action,
> >
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> >
> > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[69]

Early impact statements on controversial proposals could be quite prolix, covering volumes. The CEQ regulations provide the EIS should be "concise, clear, and to the point," and "supported by evidence that agencies have made the necessary environmental analyses."[70]

The NEPA statute does not provide for judicial review of NEPA decisions and filings.[71] It has no implementing provisions. However, the Administrative Procedure Act ("APA"), by default, covers administrative decisions in the absence of specific provisions applicable to an agency.[72] Lawsuits seeking to enforce NEPA are therefore brought pursuant to the APA.

B. The Role of the Council on Environmental Quality

The CEQ formally came into existence on January 1, 1970 as part of the NEPA statute.[73] It was supposed to play a role similar to the Council of Economic Advisors.[74] President Nixon issued an executive order directing the CEQ to issue guidelines for interpreting and applying NEPA.[75] The Supreme Court in

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68 The CEQ regulations define "human environment" as "the natural and physical environment and the relationship of people with that environment." *Id.* § 1508.14.

69 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2012).

70 40 C.F.R. § 1500.2(b).

71 *See* Sierra Club v. Kimbell, 623 F.3d 549, 558–59 (8th Cir. 2010).

72 *See* Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 557 (2012)).

73 *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 852 (1970).

74 *See The Council of Economic Advisors*, WHITE HOUSE, http://www.whitehouse.gov/cea/ [http://perma.cc/XLD6-ACTD] (last visited Oct. 28, 2019) (The Council of Economic Advisors is charged with providing the President with advice on economic policy).

75 *See* Exec. Order No. 11,514, 3 C.F.R. § 531 (1971).

Andrus v. Sierra Club[76] held that the CEQ NEPA guidelines are entitled to substantial deference.[77]

C. The NEPA Process

The NEPA process seems relatively simple in theory, but the process often takes years, even without litigation. The agency first engages in a scoping process, wherein it seeks input in focusing the impact statement.[78] It then engages in an Environmental Assessment ("EA") to decide if an EIS is necessary.[79] If not, it publishes the EA and a Finding of No Significant Impact Statement ("FONSI").[80]

A FONSI cannot be justified by a conclusion that an action would only have an insignificant impact on the environment.[81] The agency must provide a "'convincing statement of reasons'" why the environmental impact would be no more than incidental.[82]

If an EIS is needed, then a Draft Environmental Impact Statement ("DEIS") is prepared and circulated for comments.[83] The comment period will be at least forty-five days.[84] The agency responds to the comments in preparing the final EIS, variously referred to as the EIS, NEPA Statement, or FEIS. The process can entail an extended period of time—often years, when litigation is involved. A lengthy litigation process will follow in controversial proposals. One possibility in litigation is that the reviewing court will set aside the impact statement, restarting the process.

D. Standing

The first requirement for filing suit in federal court is "standing." Article III, Section 2 of the Constitution limits the jurisdiction of federal courts to cases and controversies, which the Supreme Court has construed to mean that the grievant has standing, that the case is not moot, and that it is not an advisory opinion.[85]

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76 442 U.S. 347, 358 (1979).

77 *See id.* at 358.

78 *See* GLMRIS, *What is NEPA Scoping?*, http://glmris.anl.gov/stay-involved/scoping/ [http://perma.cc/UV2Z-XJ5C].

79 *See id.*

80 *See id.*

81 *See* Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005).

82 *Id.* (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)).

83 For a discussion of the comment process, especially from fellow agencies, see Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5 (2012).

84 *See* 40 C.F.R. § 1506.1(c) (2018).

85 *See* U.S. CONST. art. III, § 2.

Standing is relatively easy for plaintiffs in enforcing NEPA. Section 10 of the Administrative Procedure Act provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[86] The question under the germinal case of *Sierra Club v. Morton* was if a non-economic injury could give standing to a complaint.[87] The Supreme Court established the parameters of modern standing, opening the doors to substantial private litigation to protect the environment.[88]

The Court held, under Section 10, that standing can be based on an aesthetic and environmental well-being.[89] It further quoted an earlier opinion, *Association of Data Processing Service Organizations, Inc. v. Camp*,[90] which said the injured interest "may reflect 'aesthetic, conservational, and recreational' as well as economic values."[91]

The Court also held that an organization can represent its members, so long as one of its members has individual standing.[92] The courthouse door thereby opened for the Sierra Club and other representative organizations to protect the environment, as well as other causes. The organizations have the resources many individuals would lack in bringing these lawsuits. The Supreme Court further held that once plaintiffs have standing, they may argue the public interest to support a claim that the agency failed to comply with statutory requirements,[93] thereby not being limited solely to the issue upon which standing was granted.

The Supreme Court, a year later, in *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), held that standing was not excluded because many persons "shared the same injury."[94]

The Supreme Court in *Lujan v. Defenders of Wildlife* held that standing has three requirements: (1) actual or imminent invasion of a concrete and particularized legally protected interest—an injury in fact; (2) a causal connection between

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86 Administrative Procedure Act, ch. 324, § 10, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 702 (2012)).

87 405 U.S. 727, 734 (1972).

88 *See id.* at 740.

89 *See id.* at 734.

90 Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970).

91 *Id.* at 154 (quoting Scenic Hudson Pres. Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965)). *See also Sierra Club*, 405 U.S. at 738 (quoting *Data Processing*, 397 U.S. at 154).

92 *See Sierra Club*, 405 U.S. at 739.

93 *See id.* at 737.

94 United States v. Students Challenging Regulatory Procedures, 412 U.S. 669, 686 (1973).

defendant's actions and plaintiff's injury; and (3) a likelihood, not just speculation, that the injury is redressable by a favorable court decision.[95]

The Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[96] followed the *Lujan* standing requirements.[97] *Friends of the Earth* involved a citizens suit under the Clean Water Act, for illegal discharges on the North Tyger River in Roebuck, South Carolina.[98] This standing analysis is applicable across the board in environmental disputes in federal court. The Court held standing exists because plaintiffs alleged that the pollution directly affected their recreational, aesthetic, and economic interests.[99] The injury in fact can include "aesthetic and recreational" values.[100] Another expansion of standing is that only one plaintiff need have standing.[101]

Another case, *Didrickson v. United States Department of the Interior*, involved a United States Fish and Wildlife Service moratorium on the takings and importation of marine mammals, with a limited exemption for Native Alaskans.[102] The case revolved around sea otters.[103] Standing was granted to those who observed, enjoyed, and studied sea otters.[104]

E. Agency Adaptation and Exhaustion of Administrative Remedies

Agencies were often initially surprised by the application of NEPA to their proposed actions. However, the agencies adapted after a series of judicial opinions impressing NEPA onto the agencies. They learned to include boiler plate discussions, such as alternatives, the language of which would appear in multiple impact statements. They learned how to include an appendix

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95 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

96 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

97 *See id.* at 180–81.

98 *See id.* at 167–68.

99 *See id.* at 183. One plaintiff was a neighbor, living a half mile from the facility, who could no longer fish, swim, or picnic in or near the river. Another plaintiff was a resident who lived two miles from the facility. She too could no longer picnic, walk, or birdwatch along the river, due to concerns about the harmful pollutants in the river. She and her husband changed their minds about purchasing a home along the river. A third plaintiff lived twenty miles from the facility. She wanted to use the area south of the facility for recreational purposes, but not in light of the pollution. A fourth plaintiff living near the facility witnessed decreased property value of their residence. Finally, a fifth plaintiff who canoed, would not canoe near the facility. *See id.* at 181–83.

100 *Id.* at 183.

101 *See* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 518 (2007); Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006).

102 982 F.2d 1332, 1334, 1340 (9th Cir. 1992).

103 *Id.* at 1334.

104 *See* Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1109 (9th Cir. 2002) (Plaintiffs hiked, hunted, fished, and camped in the area).

with their responses to the comments on a draft impact statement. The responses would show they considered the comments in their decision-making. If opponents failed to comment, then the judicial response would be that the opponents failed to exhaust their administrative remedies.

A standard rule in appealing administrative decisions is to have exhausted administrative remedies. Justice Thomas wrote in *Department of Transportation v. Public Citizen*[105] that since the complainants failed to produce alternatives, they "forfeited" any objections to the alleged failure of the agency to consider alternatives.[106]

As such, agencies were able to integrate NEPA requirements into their actions.

III. THE SPLIT BETWEEN THE LOWER COURTS AND THE SUPREME COURT

The Supreme Court, in a number of decisions, has defined the responsibilities of federal agencies under NEPA, while limiting its application as a procedural statute. The two leading cases are *Kleppe v. Sierra Club*[107] and *Vermont Yankee Nuclear Power Corp. v. NRDC*.[108]

The Supreme Court has taken a soft look when implementing NEPA, whereas the lower courts have taken a hard look. Two early nuclear energy cases, one by the Supreme Court and the other by the District of Columbia Court of Appeals, illustrate the split in the federal judiciary. The lower courts ran with NEPA as the Magna Carta of environmental protection, while the Supreme Court has consistently taken a narrow approach to implementing NEPA.

A. The Lower Court Approach: *Calvert Cliffs*

Judge Skelly Wright, known for his strong opinions, in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,[109] set the roadmap for the district and appellate courts' interpretation of NEPA early on. The Atomic Energy Commission ("AEC") contended the agency

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105 541 U.S. 752 (2004).

106 *See id.* at 764–65; *see also* Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1528 n.18 (10th Cir. 1992) ("We have held that '[w]e will not review information that [a party] failed to include in the administrative record or present before [the agency].'" (quoting N.M. Env't Improvement Div. v. Thomas, 789 F.2d 825, 835–36 (10th Cir. 1986))).

107 427 U.S. 390 (1976).

108 435 U.S. 519 (1978).

109 449 F.2d 1109 (D.C. Cir. 1971).

needed a reasonable time to adjust to NEPA's mandates because of the vagueness of the statute.[110] The AEC's rules provided environmental factors would be considered by the agency's regulatory staff, but not by the hearing board, unless raised by an outside party or staff members.[111]

Judge Wright cautioned that NEPA's "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[112] The court held environmental protection is now a mandate of every federal agency and department.[113] Environmental protection must be taken into account, and considered as other matters within the agency's mandate are considered.[114] The purposes of the impact statements are to aid in the agency's decision-making process and to inform other agencies and the public, of the environmental consequences of the planned federal action.[115]

The judge further cautioned that "the phrase 'to the fullest extent possible'" cannot serve as "an escape hatch for footdragging agencies."[116] The opinion held that the statute applies to federal licensing and permitting.[117] Judge Wright further wrote that environmental issues must be considered at every stage in the decision-making process—"at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs."[118]

The appellate court was dismayed by the AEC's attitude: "We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act."[119] The responsibility of the agency is not to sit back, but "it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation."[120] Environmental protection is to be considered "'to the fullest extent possible.'"[121] NEPA's purpose is "to tell

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110 *See id.* at 1112.
111 *See id.* at 1116–17.
112 *Id.* at 1111.
113 *See id.* at 1129.
114 *See id.* at 1112.
115 *See id.* at 1114.
116 *Id.*
117 *See id.* at 1124.
118 *Id.* at 1118.
119 *Id.* at 1117. *See also* Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1086 (D.C. Cir. 1973) ("The Commission takes an unnecessarily crabbed approach to NEPA.").
120 *Calvert Cliffs*, 449 F.2d at 1119.
121 *Id.* at 1118.

federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate."[122]

NEPA mandates a careful and informed decision-making process. The court wants environmental costs to be weighed against the "economic and technical benefits of [the] planned action."[123] The court threw the gauntlet down to the federal agencies to adhere to NEPA.[124] Another appellate court held, in *Zabel v. Tabb*, that the Army Corps of Engineers ("Corps") could use the environmental impacts to deny a dredge and fill permit.[125]

While the District of Columbia Court of Appeals ran with the concept of NEPA as the Magna Carta of environmental protection, the United States Supreme Court has implemented NEPA more narrowly.

B. The Higher Courts' Approach: *Vermont Yankee*

1. The Court of Appeals

Vermont Yankee was a consolidation of two nuclear reactor cases: one in Michigan[126] and one in Vermont.[127] Both involved NEPA questions, with energy conservation in the Michigan case, and the handling of nuclear waste in the Vermont case. A cynic might believe in Nietzsche's eternal recurrence of history since both issues are still with us today. [128]

The AEC held hearings on licensing the Vermont Yankee nuclear plant.[129] The AEC had to consider the disposal of the spent fuel in its analysis.[130] The AEC relied upon a staff report prepared by Dr. Frank Pittman on the waste issue.[131] Intervenors questioned the quality of the report.[132] The agency's lawyers

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122 *Id.* at 1122.

123 *Id.* at 1123.

124 *See* Izaak Walton League of Am. v. Schlesinger, 337 F. Supp. 287, 296 (D.D.C. 1971). A district court, shortly after *Calvert Cliffs*, set aside a "temporary" license permitting operation at 20% capacity without a detailed EIS. *Id.* at 289.

125 *See* 430 F.2d 199, 209–10, 214 (5th Cir. 1970).

126 *See* Aeschliman v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976).

127 *See* Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976).

128 *See* FRIEDRICH NIETZSCHE, THUS SPAKE ZARATHUSTRA 174 (Thomas Common trans., 1917).

129 *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 527–28 (1978).

130 *Id.* at 533.

131 *See Nuclear Regulatory*, 547 F.2d at 647.

132 *See Yankee*, 435 U.S. at 542.

briskly cross-examined the intervenors while treating Dr. Pittman with kid's gloves.[133]

The primary legal issue for the intervenors, and the Court of Appeals in *Vermont Yankee*, was the standard of review to be accorded to agency action, which entails tremendous health and safety risks to the general public.[134] The thrust of the intervenors' position can partially be explained by this excerpt from the Court of Appeals decision: "They reiterated repeatedly that the problems involved are not merely technical, but involve basic philosophical issues concerning man's ability to make commitments which will require stable social structures for unprecedented periods."[135]

The staff of the Nuclear Regulatory Commission ("NRC"), successor to the AEC, prepared a Table S-3 Rule using numerical values to reflect the environmental effects of the fuel cycle, which would then be incorporated into a cost-benefit study in individual licensing cases.[136] The NRC concluded that the effects were relatively insignificant.[137]

The NRC gave great deference to the staff's twenty-page conclusory report.[138] Conversely, it treated the intervenors with open hostility.[139] The intervenors were denied the opportunity to question the Commission's staff.[140]

In dealing with a substance such as plutonium, which has a half-life of 25,000 years and must be isolated from the environment for 250,000 years before it becomes harmless, society is properly concerned with ensuring its safe handling.[141] To the extent that litigation brings these issues before the courts, it is highly foreseeable that many courts will thereby be swayed in their reasoning by staff reports.

Thus, as expressed by Judge Bazelon in a concurring opinion:

> Decisions in areas touching the environment or medicine affect the lives and health of all. These interests, like the First Amendment, have "always had a special claim to judicial protection." Consequently,

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133 *See Nuclear Regulatory*, 547 F.2d at 633.
134 *See id.* at 637.
135 *Id.* at 652.
136 *See id.* at 638.
137 *Id.*
138 *See id.* at 647.
139 *See id.* at 652.
140 *See id.* at 651.
141 *Id.* at 639.

> more precision may be required than the less rigorous development of scientific facts which may attend notice and comment procedures.[142]

The Commission adopted the following procedures: (1) the report would be made available before the hearing, along with background materials; (2) all participants would be given a reasonable opportunity to present their views, accompanied by counsel if they wished; and (3) written and oral statements, if time permits (persons presenting oral remarks would be subject to questioning by the Commission).[143] A transcript was available for comment after the hearing.[144]

Judicial concern is heightened when the record appears grossly inadequate on a critical matter, such as nuclear waste disposal.[145] On such an important issue as the handling of nuclear waste, with all the long-term implications for humanity, the appellate tribunal was singularly unimpressed with the twenty page conclusory study by Dr. Pittman and the marked reliance on it by the Commission.[146] One comment was "[t]he board's quiescence regarding Dr. Pittman is in marked contrast to its often hostile questioning of expert witnesses for the intervenors."[147]

The appellate court remanded the case to the NRC with orders that the Commission give the intervenors the right of cross examination.[148]

The majority opinion stated, in general:

> An agency need not respond to frivolous or repetitive comment [sic] it receives. However, where apparently significant information has been brought to its attention, or substantial issues of policy or gaps in its reasoning raised, the statement of basis and purpose must indicate why the agency decided the criticisms were invalid. Boilerplate generalities brushing aside detailed criticism on the basis of agency "judgment" or "expertise" avail nothing; what is required is a reasoned response, in which the agency points to particulars in the record

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142 *Id.* at 657 (Bazelon, J., concurring) (footnote omitted). In an unusual opinion, Judge Bazelon wrote both the majority opinion and also a separate concurring opinion.

143 *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 529 (1978).

144 *See id.*

145 *See id.* at 549–55.

146 *See Nuclear Regulatory*, 547 F.2d at 647.

147 The quote was originally in footnote 53 of the court of appeals decision, Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, Nos. 74-1385, 74-1586 (D.C. Cir. July 21, 1976), *reprinted in* 1 Appendix to Petitions for Writs of Certiorari filed September 21 and October 14, 1976 at 61, Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (Nos. 76-419, 76-528), but was subsequently ordered removed. Petition for Review of an Order of the Nuclear Regulatory Comm'n at 88, Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, Nos. 74-1385, 74-1586 (D.C. Cir. July 21, 1976). The footnote, however, still appears in the case on LexisNexis.

148 *See Nuclear Regulatory*, 547 F.2d at 655.

> which, when coupled with its reservoir of expertise, support its resolution of the controversy. An agency may abuse its discretion by proceeding to a decision which the record before it will not sustain, in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers.[149]

This opinion also stated:

> We do not dispute these conclusions. We may not uphold them, however, lacking a thorough explanation and a meaningful opportunity to challenge the judgments underlying them. Our duty is to insure that the reasoning on which such judgments depend, and the data supporting them, are spread out in detail on the public record. Society must depend largely on oversight by the technically-trained members of the agency and the scientific community at large to monitor technical decisions. The problem with the conclusory quality of Dr. Pittman's statement and the complete absence of any probing of its underlying basis is that it frustrates oversight by anyone.[150]

The court continued:

> To the extent that uncertainties necessarily underlie predictions of this importance on the frontiers of science and technology, there is a concomitant necessity to confront and explore fully the depth and consequences of such uncertainties. Not only were the generalities relied on in this case not subject to rigorous probing in any form but when apparently substantial criticisms were brought to the Commission's attention, it simply ignored them, or brushed them aside without answer. Without a thorough exploration of the problems involved in waste disposal, including past mistakes, and a forthright assessment of the uncertainties and differences in expert opinion, this type of agency action cannot pass muster as reasoned decisionmaking.[151]

2. The Supreme Court

The Supreme Court strongly disagreed with the D.C. Circuit, reiterating precedence including *Kleppe v. Sierra Club*,[152] and stating, "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."'"[153]

The Court, again in citing precedence, stated NEPA does not repeal, by implication, any other statute.[154] Nor would it,

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149 *Id.* at 646 (footnotes omitted).

150 *Id.* at 651.

151 *Id.* at 653.

152 427 U.S. 390 (1976).

153 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)).

154 *Id.* at 548 (citing Aberdeen & R. R. Co. v. SCRAP, 422 U.S. 289, 319 (1975)).

therefore, add to the procedures set forth in the Administrative Procedures Act.[155] Indeed, section 104 of NEPA provides the statute would not "affect the specific statutory obligations of any Federal agency."[156]

The Court thereby held that an agency only has to follow the prescribed procedures under NEPA.[157] Therefore, a court cannot require an agency to employ more procedures. The Court reversed to determine if the original rule was adequately justified by the administrative record, cautioning that the appellate court could not substitute its judgment for the agency's.[158]

The Supreme Court limited the role of the federal judiciary in reviewing an EIS to exclude second guessing the substantive decision by the agency. Congress intended "to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency."[159] Part of the lessons of *Vermont Yankee* and, subsequently, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, is that the agency is not under a duty to place environmental considerations over other appropriate considerations.[160]

The D.C. Circuit in *Aeschliman v. United States Nuclear Regulatory Commission* held the agency had to include energy conservation as an alternative in its EIS on the proposed Consumers Power Company's twin reactors in Midland, Michigan.[161] The Licensing Board rejected energy conservation as "beyond our province."[162] The "real question" for the agency was which power generating technology was superior.[163]

The agency viewed energy conservation as a novel concept.[164] It therefore shifted the burden to the intervenors, holding they "must state clear and reasonably specific energy conservation contentions."[165] The appellate court held the agency had to undertake a "preliminary investigation of the proffered alternative to reach a rational judgment" as to whether to pursue it further.[166]

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155 *See id.* at 524.
156 National Environmental Policy Act of 1969 § 104, 42 U.S.C. § 4334 (2012).
157 *See Yankee*, 435 U.S. at 558.
158 *See id.*
159 *See id.*
160 *See* 444 U.S. 223, 227 (1980).
161 *See* 547 F.2d 622, 632 (D.C. Cir. 1976).
162 *Yankee*, 435 U.S. at 532.
163 *Aeschliman*, 547 F.2d. at 625.
164 *Yankee*, 435 U.S. at 534.
165 *Aeschliman*, 547 F.2d at 626.
166 *Id.* at 628.

The Court cautioned that "[c]ommon sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man."[167] The courts are not to substitute their judgment for that of the agency on the merits of the decision.[168] Thus, as the Court said in *Strycker's Bay*:[169]

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of action to be taken."[170]

The Supreme Court held that NEPA is a procedural statute—in a sense, an environmental full disclosure act.[171] The project could result in an environmental disaster, but as long as the potential consequences were fully disclosed, the project could proceed. The duty on the part of the agency is to take a hard look at the environmental consequences,[172] "to ensure that environmental concerns are integrated into the very process of [federal] agency decisionmaking."[173] The purpose of NEPA is not to "mandate particular results," but to prescribe the necessary process.[174]

3. *Vermont Yankee* on Remand: *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*

The Court of Appeals on remand again invalidated the license for *Vermont Yankee* on the grounds that the NRC rules failed to consider the uncertainties of the long-term isolation of high-level and transuranic wastes, as well as an improper consideration of the health, socioeconomic, and cumulative effects of fuel-cycle activities.[175] The NRC's revised Table S-3 stated that solidified high-level and solidified wastes would remain buried in a federal depository, and thus would have no effect on the environment.[176]

Judge Edwards, in his concurring opinion, emphasized the importance of the case:

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167 *Yankee*, 435 U.S. at 551.
168 *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980).
169 *Id.*
170 *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).
171 *See Yankee*, 435 U.S. at 558.
172 *See Kleppe*, 427 U.S. at 410 n.21; *see also Strycker's Bay*, 444 U.S. at 227–28.
173 Morris Cty. Trust for Historic Pres. v. Pierce, 714 F.2d 271, 274 (3d Cir. 1983).
174 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
175 *See* Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 685 F.2d 459, 478–79 (D.C. Cir. 1982).
176 *See* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 92 (1983).

> In this case we are required to review the continuing effort of the NRC to pit human intelligence against the most primordial force of nature. This force, when involved in its most awful manifestation, exceeds the power of flood, fire, pestilence, earthquake, hurricane and volcano. In this century, it has been demonstrated in this and other countries that this force can be employed for peace and war—for warming a baby's bottle and for nuclear holocaust.[177]

Judge Wilkey dissented, stating it is clear that the D.C. Court of Appeals has assumed a role of the high public protector of all that is good from the "perceived evils of the nuclear age."[178]

The Supreme Court once again reversed the appellate court.[179] The Court reiterated that judicial review under NEPA or the APA is limited to procedural review.[180] The role of the courts is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions,"[181] and the "decision is not arbitrary or capricious."[182] NEPA does not require an agency "to elevate environmental concerns over other appropriate considerations."[183]

NEPA serves two purposes: (1) it places an obligation on the agency to consider every significant aspect of the environmental impact of a proposed federal action; and (2) it ensures the agency will inform the public that it has considered environmental concerns in the decision-making process.[184]

The Court cautioned that the agency is making predictions within its "area of special expertise, at the frontiers of science."[185] The courts should therefore be most deferential when reviewing informed decisions of agencies involving issues of science, technical expertise, or complex environmental statutes.[186]

Thus, we have the split between the appellate court and the Supreme Court. The D.C. Circuit was taking a hard look at the risks and long-term safety of nuclear, and found the regulatory agency wanting. The Supreme Court was consistently willing to defer to the expertise of the agency based on a soft look approach. The Court was adamant in its position on the safety and advisability of nuclear power:

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177 *Nuclear Regulatory*, 685 F.2d at 495.
178 *Id.* at 517 (Wilkey, J., dissenting).
179 *Balt. Gas*, 462 U.S. at 108.
180 *See id.* at 97.
181 *Id.* at 98.
182 *Id.*
183 *Id.* at 97 (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)).
184 *See id.* at 95–96.
185 *Id.* at 103.
186 *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 377 (1989).

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States . . . which must eventually make that judgment.[187]

4. *Kleppe v. Sierra Club*

The Supreme Court held in *Kleppe v. Sierra Club* that an EIS in not required until an agency has issued a report or recommendation on a major federal action.[188] The question is not whether a federal action is contemplated, but whether it is proposed.[189] Two other propositions came out of *Kleppe*. First, the role of the courts is not to "substitute [their] judgment for that of the agency as to the environmental consequences of its actions."[190] The Supreme Court in *Vermont Yankee* cited *Kleppe* for the proposition that "[n]either the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."[191] The courts are not to substitute their judgment for that of the agency on the merits of the decision.[192]

The second critical holding is that the courts' role is to ensure that the agency took a hard look at the environmental consequences of the proposal.[193] Thus, as the Court said in *Strycker's Bay*:

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[194]

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187 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 557–58 (1978).

188 427 U.S. 390, 411–12 (1976).

189 *Id.* at 398–99.

190 *Id.* at 410 n.21 (citing Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 407 U.S. 926 (1972)).

191 *Id.*

192 *See id.*

193 *Id.* (citing Nat. Res. Def. Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

194 Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

Strycker's Bay involved a low-income housing project on Manhattan's Upper West Side.[195] The Department of Housing and Urban Development approved the location because relocation would result in an "unacceptable delay."[196] Opposition to low-income housing, and now resettlement of the homeless, continues to be a major cause of EIS, both under NEPA if federal action is involved, and under state equivalents, such as the California Environmental Quality Act ("CEQA").[197]

Justice Marshall, in his separate *Kleppe* opinion, opined: "[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. . . . [C]ourts have responded in just that manner and have created such a 'common law.'"[198] Lower courts tried, but the Supreme Court envisioned a more restrictive role for NEPA.

IV. NEPA'S LANGUAGE

The language of NEPA was designed to further its purposes of considering potential environmental impacts and disclosing such potential environmental impacts. This section evaluates the key language and terms used throughout NEPA.

A. Alternatives,[199] Perfection, and Flyspecking

The NEPA statement, also known as the EIS, has to analyze all reasonable alternatives.[200] The possible alternatives to a proposal, including doing nothing, are limited only by the creativity of project opponents. Thus, a line has to be drawn. The EIS should include a discussion of reasonable alternatives. [201]

Courts have posited that three questions should be answered as to alternatives: (1) what is the purpose of the proposed project; (2) what are the reasonable alternatives in light of the purpose; and (3) to what extent should each alternative be explored?[202]

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195 *Id.* at 223.

196 *Id.* at 226.

197 California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21189.57 (West 2014).

198 *Kleppe*, 427 U.S. at 421 (Marshall, J., concurring in part and dissenting in part).

199 For a general discussion of alternatives, see James Allen, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 J. LAND RESOURCES & ENVTL. L. 287, 287 (2005).

200 *See* 40 C.F.R. § 1502.14 (2018).

201 *See* Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997); 40 C.F.R. § 1502.14.

202 *See Simmons*, 120 F.3d at 668; City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 95 F.3d 892, 903 (9th Cir. 1996).

The starting point is to ascertain the project's purpose. It is axiomatic that the "broader the purpose" of the proposal, the "wider the range of alternatives; and vice versa."[203] The agency should focus its resources on the potentially available alternatives and not the unworkable.[204]

The EIS should vigorously explore and explain all reasonable alternatives to provide a clear basis for choice among the alternatives.[205] "Reasonable alternatives are those which are 'bounded by some notion of feasibility,' and, thus, need not include alternatives which are remote, speculative, impractical, or ineffective."[206] CEQ regulations require alternatives considered by the decision maker to be discussed in the EIS.[207] A no-action alternative must be considered in the analysis.[208]

In 1972, the D.C. Circuit in *Natural Resources Defense Council v. Morton* adopted a rule of reason approach, that an agency must consider all reasonable alternatives, including those outside the agency's jurisdiction.[209] The rule of reason approach received support by the Supreme Court in *Vermont Yankee*,[210] and it has been widely followed ever since.

Opponents of a proposal will nitpick and flyspeck an EIS to find something, anything, to invalidate it, hoping to send it back and delay the project. They will argue that alternatives were either not considered or inadequately considered. They will further claim that the agency did not take a hard look at the alternatives, or the adverse environmental consequences of the project. Courts do not demand perfection in an EIS; however, they do frown upon flyspecking a statement on some little point.[211] The Supreme Court in *Vermont Yankee* cautioned: "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found

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203 *Simmons*, 120 F.3d at 666.

204 *See id.* at 669.

205 *See* WildEarth Guardians v. U.S. Forest Serv., 828 F. Supp. 2d 1223, 1236 (D. Colo. 2011); 40 C.F.R. § 1502.14.

206 *WildEarth Guardians*, 828 F. Supp. 2d at 1236–37 (citation omitted) (citing Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1172 (10th Cir. 2002)).

207 *See* 40 C.F.R. § 1505.1(e).

208 *See id.* § 1502.14.

209 Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

210 *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553–55 (1978).

211 *See* Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176–77 (10th Cir. 2008); Wilderness Workshop v. U.S. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1152 (D. Colo. 2018); Gov't of Province of Manitoba v. Zinke, 273 F. Supp. 3d 145, 152 (D.D.C. 2017) (holding that the court would not give credence to looking for a defect no matter how minimal (citing Nevada v. Dep't of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006))).

wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man."[212]

B. Arbitrary and Capricious

The general standards of review of the APA are laid out in *Citizens to Preserve Overton Park Inc. v. Volpe*,[213] which is often cited to in NEPA cases. The Supreme Court adopted the arbitrary and capricious standard in reviewing a decision under NEPA.[214]

A decision can be arbitrary and capricious if it fails to consider an important aspect of the problem, offers an explanation contra to the evidence before the agency, or is a clear error of judgment.[215] Another way of establishing that a decision is arbitrary and capricious is if the agency relied on entirely false premises or information.[216]

C. Significant Effect

The CEQ guidelines provide a list of relevant factors, which include: effects on public health and safety; unique characteristics of the geographic area, such as national parks or cultural resources; uncertainty of potential effects; whether special cumulative effects are likely; the degree to which historic districts and landmarks would be affected; the degree to which endangered species might be affected; and the degree of controversy surrounding the effects on the human environment.[217]

The Ninth Circuit in *City of Davis v. Coleman*[218] held an EIS is required when a plaintiff raises subsequent questions about a proposal's significant impacts.[219]

D. The Breadth of NEPA: Direct, Indirect, and Cumulative Impacts

NEPA's application is not narrowly confined to the direct impacts of the proposed federal action. The EIS should include discussions of cumulative impacts and indirect impacts as well.

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212 *Yankee*, 435 U.S. at 551.

213 401 U.S. 402, 413–14 (1971).

214 *See* Kleppe v. Sierra Club, 427 U.S. 390, 412, 414 (1976) ("We cannot say that petitioners' choices are arbitrary.").

215 *See* N.M. *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 704 (10th Cir. 2009); Utah Envtl. Cong. v. Troyer, 479 F.3d 1269, 1280 (10th Cir. 2007).

216 *See* Van Abbema v. Fornell, 807 F.2d 633, 639 (7th Cir. 1986) ("[A] decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a 'reasoned decision.'" (quoting Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1035 (2d Cir. 1983))).

217 *See* 40 C.F.R. § 1508.27(b) (2018).

218 521 F.2d 661 (9th Cir. 1975).

219 *See id.* at 673.

1. Direct Impacts

Direct impacts should be the easiest to discuss. They are "caused by the action and occur at the same time and place."[220]

2. Cumulative Impacts

Impact statements must also take into account the cumulative impact of a project.[221] The CEQ regulations on cumulative impacts provide that "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment,"[222] which is "the impact on the environment which results from the incremental impact of the program which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[223] It is not necessarily the result of a single act, but the cumulative impacts of several acts.[224]

One approach to cumulative impacts on programmatic or management plans is to tier the impact statements with the general EIS, providing a broad overview on the impacts and leaving the specific details to be discussed on the site-specific impact statements.[225] NEPA allows the statements for multi-stage projects to be programmatic, and to be followed by individual EIS' on the subsequent developments.[226] The programmatic EIS should analyze the broad impacts.[227]

3. Indirect Impacts

Justice Douglas in his dissenting opinion in *Sierra Club v. Morton* talked about the peripheral impact, the growth inducing impacts of projects.[228] For example, think of the commercial development around a major airport or the development on the main streets adjoining a large mall.

Impact statements need to include indirect impacts, which "are defined as being caused by the action and are later in time or farther removed in distance but still reasonably foreseeable."[229]

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220 40 C.F.R. § 1508.8(a).
221 *See* Ocean Advocates v. U.S. Army Corp of Eng'rs, 402 F.3d 846, 868 (9th Cir. 2005).
222 40 C.F.R. § 1508.27.
223 *Id.* § 1508.7.
224 *See id.*
225 *See, e.g.*, Sierra Club v. Marita, 46 F.3d 606, 614 n.5 (7th Cir. 1995).
226 *See* 40 C.F.R. § 1508.7.
227 *See* 43 C.F.R. § 46.140(c) (2018).
228 405 U.S. 727, 743 n.5 (1972) (Douglas, J., dissenting). Justice Douglas mentioned that an adjoining landowner planned to piggyback his 100 acres into a resort complex. *Id.*
229 Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1177 (10th Cir. 2002) (citing 40 C.F.R. § 1508(b)).

These can often be viewed as secondary or peripheral developments. Indirect impacts can be growth inducing actions, such as building a highway interchange.[230] For example, as you drive across country along the interstates, you will witness a proliferation of motels, restaurants, and gas stations along the interchanges. Similarly, a large mall encourages substantial development outside its borders. Disneyland and Disneyworld, on a larger scale, have spurred large commercial and residential development in Anaheim and Orlando, respectively. An independent study shows Disneyland contributes $5.7 billion annually to the Southern California economy.[231]

E. Exceptions

NEPA has a few exceptions. One little known exception recognized by the CEQ is for emergency actions in which time is of the essence.[232] Besides that unique exception, there are other exceptions that come up more frequently.

1. Lack of Discretion

An agency has no duty to prepare an impact statement if it lacks discretion in the action.[233]

The Department of Housing and Urban Development, by statute, had to approve a subdivision within thirty days as long as the proper disclosures were made.[234] NEPA must give way when a direct conflict exists with another statute.[235]

Similarly, the Supreme Court in *Department of Transportation v. Public Citizen*,[236] held the Department of Transportation (Federal Motor Carrier Safety Administration ("FMCSA")) did not have to evaluate the environmental cross-border operation of Mexican truckers because it lacked discretion to countermand the President's authorization of the truckers pursuant to the North American Free Trade Agreement.[237] The FMCSA had to grant

230 *See, e.g.*, City of Davis v. Coleman, 521 F.2d 661, 674–75 (9th Cir. 1975).

231 *See Disneyland Resort Generates $5.7 Billion for Southern California Economy*, DISNEYLAND RESORT PUB. AFFAIRS, http://publicaffairs.disneyland.com/disneyland-resort-generates-5-7-billion-for-southern-california-economy-2/ [http://perma.cc/U8AB-LS4E] (last visited Oct. 6, 2019).

232 *See* 40 C.F.R. § 1506.11.

233 *See* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 791 (1976).

234 *See id.* at 776.

235 *See id.* at 788–90.

236 541 U.S. 752 (2004). *See also* South Dakota v. Andrus, 614 F.2d 1190, 1194–95 (8th Cir. 1980) (finding that the issuance of a mineral patent was not a "major" federal action).

237 *Public Citizen*, 541 U.S. at 759. The United States agreed under the North American Free Trade Act to allow Canadian and Mexican truckers to obtain operating permits in the United States. *Id.*

licenses to carriers who met the safety and financial responsibility requirements.[238] The Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[239]

NEPA does not supersede other statutes. NEPA's requirements defer to the other statute in cases of conflict. Indeed, Section 104 provides that NEPA shall not affect the requirements of other statutes, including compliance with criteria or standards of environmental quality.[240]

2. Congressional Exceptions

Congress, by statute, can carve out exceptions to NEPA.[241] For example, The Water Pollution Control Act provides no action taken under it shall constitute major federal action within the meaning of NEPA.[242] Another example is Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which provides that the Secretary of Homeland Security can waive any law, including NEPA, if necessary to facilitate "expeditious construction" of structures along the Mexican border.[243] This power has been exercised several times, including September 12, 2017 along the San Diego border.[244]

3. Status Quo

NEPA is geared to analyze changes in the physical environment. An EIS is not required, therefore, to leave nature alone or preserve the status quo.[245] Similarly, rebuilding a bridge that was destroyed in a hurricane on substantially the same alignment does not need an EIS.[246] A duty to prepare an EIS is

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238 *See id.* at 758–59.

239 *Id.* at 770.

240 *See* National Environmental Policy Act of 1969 § 104, 42 U.S.C. § 4334 (2012).

241 *See* Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 435 (1991); Aaron Ehrlich, *In Hidden Places: Congressional Legislation that Limits the Scope of the National Environmental Policy Act*, 13 HASTINGS WEST NORTHWEST J. ENVTL. L. & POL'Y 285, 285 (2007).

242 *See* Water Pollution Control Act, 33 U.S.C. § 1371(c)(1) (2019).

243 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009–546, 8 U.S.C. § 1103 Note (2012).

244 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42829 (Sept. 12, 2017).

245 *See* Douglas Cty. v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995).

246 *See* Sierra Club v. Hassell, 636 F.2d 1095, 1099 (5th Cir. 1981). The bridge connected Dauphin Island with the mainland of Alabama. *Id.* at 1097.

only triggered by a change in the status quo;[247] whereas, rebuilding the bridge restored the preexisting status quo.[248]

4. Functional Equivalencies

In other situations, such as the Clean Air Act, the analysis to be undertaken by the agency can be viewed as the functional equivalent of an EIS.[249] For example, the D.C. Circuit in 1973 held NEPA does not apply when a statute designed to protect the environment includes requirements similar to NEPA.[250]

In the case of a statute which does not provide for discretion, such as the listing of endangered species under the Endangered Species Act ("ESA"),[251] NEPA would interfere with the statutory requirements of the ESA and would not further the purposes of the ESA.[252] Therefore, where the purposes of consideration and disclosure are met by the requirements of other statutes, they can be excluded from NEPA requirements.

5. Categorical Exclusions

CEQ regulations also carve out categorical exclusions from NEPA. This label covers minor actions, such as routine maintenance, that "do not individually or cumulatively have a significant effect on the human environment."[253] However, the exemption is inapplicable if a normally excluded activity would have a significant environmental effect.[254]

F. International (Extraterritorial) Application of NEPA

A case from four decades ago shows the reach of NEPA. Both the Mexican and United States governments were very concerned with marijuana smuggling from Mexico, where it was being grown in the mountains.[255] The Mexican government feared two things could happen if they sent the Federales into the mountains: they could be killed or corrupted.[256] The solution was to spray the marijuana crops with Paraquat, a potent

247 *Id.* at 1099.
248 *Id.*
249 *See, e.g.*, Wyoming v. Hathaway, 525 F.2d 66, 72 (10th Cir. 1975).
250 *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384–85 (D.C. Cir. 1973).
251 Endangered Species Act of 1973 § 4, 16 U.S.C. § 1533 (2012).
252 *See* Pac. Legal Found. v. Andrus, 657 F.2d 829, 835 (6th Cir. 1981).
253 40 C.F.R. § 1508.4 (2018).
254 *See id.*
255 *See* Jesse Kornbluth, *Poisonous Fallout From The War on Marijuana*, N.Y. TIMES (Nov. 19, 1978), http://www.nytimes.com/1978/11/19/archives/poisonous-fallout-from-the-war-on-marijuana-paraquat.html [http://perma.cc/96BA-5WNR].
256 *Id.*

herbicide.[257] The poisoned crops could be inhaled by consumers in the United States.[258] The United States was providing technical assistance and $12 million annually in funding.[259]

The National Organization of Marijuana Reform ("NORML") brought suit under NEPA.[260] The court found the United States's action constituted a major federal action affecting the quality of the human environment.[261] The case was complicated because marijuana use was then illegal in the United States.[262] The court thereby refused to enjoin the federal action, but required preparation of an EIS.[263]

Another example of the extraterritorial application of NEPA is *Sierra Club v. Adams*, which involved the United States providing funding for the construction of the Darien Gap portion of the Pan American Highway through Columbia and Panama.[264] The D.C. Circuit Court of Appeals assumed that NEPA was fully applicable to the construction in Panama.[265]

Environmental Defense Fund, Inc. v. Massey applied NEPA when the National Science Foundation proposed to burn food waste in Antarctica.[266] The commonality between NORML and Antarctica waste burning is that the cases involved American actors or potential victims, which is different from applying NEPA to acts within foreign countries lacking an American actor or victim.

Two themes underlie the extraterritorial application of NEPA. The first is a presumption against extraterritorial application of United States laws.[267] The second is the intent of Congress, because Congress can expressly legislate the extraterritorial application of U.S. laws.[268] NEPA does not expressly contain such a provision. However, the argument can be made based on one of

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257 *See Nat'l Org. for the Reform of Marijuana Laws v. U.S. Dep't of State*, 452 F. Supp. 1226, 1228 (D.D.C. 1978).

258 Paraquat can affect the liver, kidneys, heart, and respiratory system. It can be deadly if ingested.

259 *See Reform of Marijuana Laws*, 452 F. Supp. at 1231.

260 *See id.* at 1228.

261 *See id.* at 1235.

262 *See id.* at 1229.

263 *Id.* at 1235.

264 578 F.2d 389, 391 (D.C. Cir. 1978).

265 *Id.* at 392. However, the court noted in a footnote that the government's brief stated it did not question jurisdiction in the case. *Id.* at 391 n.14.

266 986 F.2d 528, 529 (D.C. Cir. 1993).

267 *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

268 *See Morrison*, 561 U.S. at 255.

the hortatory statements in NEPA.[269] Section 102 provides that all agencies of the federal government, to the fullest extent possible, shall: "[R]ecognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[270]

NEPA's language allows the legislation to extend its reach beyond the physical borders of the United States of America.

G. *Andrus v. Sierra Club*[271] and Budget Proposals

The NEPA statute requires impact statements on proposals for legislation. The question in *Andrus* was whether proposed budget cuts to the National Wildlife Refuge System triggered NEPA.[272] The district court answered in the positive,[273] and held appropriation requests constitute requests for legislation.[274] The court of appeals limited the holding to appropriation requests accompanying a proposal for "taking new action which significantly changes the status" or if it ushers in a considered programmatic course following a programmatic review.[275]

Justice Brennan wrote the unanimous Supreme Court opinion holding that a budget request is neither a request for legislation nor a major federal action.[276] The Court held CEQ's NEPA interpretation is "entitled to substantial deference."[277] The CEQ regulations provide "'[l]egislation' includes a bill or legislative proposal to Congress," but excludes "requests for appropriations."[278] The CEQ regulation followed the traditional Congressional distinction between legislation and appropriation.[279] The Court's opinion also reiterated that the CEQ NEPA guidelines are "entitled to substantial deference."[280]

The Supreme Court construed Section 102(2)(C) to have two goals. The first is to integrate environmental considerations into the

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269 *See, e.g.*, Silvia M. Riechel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 122 (1994).
270 National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(F) (2012).
271 442 U.S. 347 (1979).
272 *See id.* at 353.
273 *See id.* at 353–54.
274 *Id.* (quoting Sierra Club v. Morton, 395 F. Supp. 1187, 1198–99 (D.D.C. 1975)).
275 Sierra Club v. Andrus, 581 F.2d 895, 903 (D.C. Cir. 1978).
276 *See Andrus*, 442 U.S. at 363.
277 *Id.* at 358.
278 *Id.* at 357 (quoting 40 C.F.R. § 1508.17 (2018)).
279 *Id.* at 359–61.
280 *Id.* at 358.

decision-making process by requiring the preparation of an EIS.[281] The second is to inform the public that the agency considered environmental factors in the decision-making process.[282]

H. Worst-Case Analysis: Structures Fail and Tragedies Occur

The catastrophic collapse of the Teton Dam in Idaho on June 5, 1976 killed eleven people and caused $2 billion in damages,[283] while 25,000 people were left homeless.[284] The tragic failure triggered the issue of whether EISs should include worst-case analysis. The Teton Dam EIS was said to be fourteen pages and prepared by one person.[285] It simply assumed, without mention, that the dam would not, and could not, fail because the Bureau of Reclamation ("BuRec") had a stellar reputation for dam safety.[286] It was inconceivable that a BuRec dam could collapse on its initial filling, but it did. In reviewing the NEPA challenge that occurred prior to the dam collapse, the Ninth Circuit upheld the NEPA Statement: "Appellants urge that the EIS is inadequate because it fails to discuss many possible environmental consequences. Many of these consequences while possible are improbable. An EIS need not discuss remote and highly speculative consequences."[287]

Teton Dam created awareness of the need for worst-case analysis. President Carter directed the CEQ to issue binding regulations on worst-case analysis.[288] Its subsequent regulation provided for worst-case analysis in the impact statement,[289] but then replaced the regulation by lowering the requirement to now prepare "a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts" and to prepare an evaluation of such impacts "based upon theoretical approaches or research methods generally accepted in the scientific community."[290]

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281 *See id.* at 350.

282 *See id.* at 351–52.

283 *See* Luke Ramseth & Bryan Clark, *Teton Dam collapse 40 years ago was worst man-made disaster in Idaho history*, SPOKESMAN-REVIEW (June 5, 2016), http://www.spokesman.com/stories/2016/jun/05/teton-dam-collapse-40-years-ago-was-the-worst-man-/ [http://perma.cc/L5QS-EAH8].

284 *See id.*

285 *See* F. Ross Peterson, *The Teton Dam Disaster: Tragedy or Triumph?*, UTAH ST. U. 1, 6 (1982).

286 I became involved with the legal aspects of dam safety as a result of Teton Dam's failure and looked closely at the causes of the failure. The dam failed because of a multitude of engineering and construction mistakes, which trace back to hubris on the part of the agency.

287 Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).

288 *See* Exec. Order No. 11,991, 3 C.F.R. § 123 (1978).

289 40 C.F.R. § 1502.22(b) (1985).

290 40 C.F.R. § 1502.22(b) (2018).

Sierra Club v. Sigler is the germinal case for worst-case analysis.[291] An EIS was prepared for a distribution center and deepwater port in Galveston Bay.[292] Concern was raised over the possibility of a supertanker accident with a total loss of oil.[293] The Corps considered the worst-case would not cause a greater probability of an oil spill than currently exists; therefore, it considered a discussion unnecessary.[294] The fears, though, were well founded in light of a number of incidents. The Fifth Circuit held the impact statement should include a worst-case analysis before issuing a permit.[295] The court held the analysis was necessary, because even if the risk of a supertanker total loss of cargo was small, the potential environmental disaster was great.[296]

The CEQ responded to these cases by redrafting the worst-case language in the regulations. The revised regulation "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'"[297]

The Supreme Court upheld the revised CEQ regulations in *Robertson v. Methow Valley Citizens Council*,[298] and held that they are entitled to substantial deference.[299] The Court further reasoned that the prior CEQ regulation was not a codification of existing NEPA case law.[300] NEPA requires a process, but does not mandate a specific result: "[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[301]

I. Mitigation

Pursuant to *Vermont Yankee* and CEQ regulations, NEPA compels only a "reasonably complete discussion of possible mitigation measures."[302] The Supreme Court consistently held NEPA is an environmental full disclosure act.[303] The question arises whether there is a duty to employ mitigation measures discussed in the EIS. The Supreme Court answered in the

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291 695 F.2d 957 (5th Cir. 1983).
292 *See id.* at 962.
293 *See id.* at 968.
294 *See id.*
295 *See id.* at 975.
296 *Id.* at 973; *see also* S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1479 (9th Cir. 1983).
297 National Environmental Policy Act Regulations, 50 Fed. Reg. 32,237 (Aug. 9, 1985).
298 490 U.S. 332 (1989).
299 *Id.* at 356.
300 *See id.* at 355.
301 *Id.* at 350.
302 *Id.* at 352.
303 *See id.* at 348.

negative in *Robertson v. Methow Valley Citizens Council*.[304] The case involved a Forest Service decision to issue a special use permit for an alpine ski resort in a pristine area of the North Cascades.[305] The environmental study suggested a number of mitigation steps that could be taken, but did not prepare a detailed mitigation plan.[306]

The Ninth Circuit, in *South Fork Band Council*, held NEPA imposes a positive duty to discuss mitigation measures, without necessarily developing a complete mitigation plan.[307] Such plan requires an analysis of whether the mitigation measures can be effective.[308]

The Supreme Court reiterated that the courts are not to substitute their judgment for the judgment of the agencies.[309] NEPA does not impose a substantive duty on agencies to decide on environmentally preferable alternatives.[310] It again stated "NEPA merely prohibits uninformed—rather than unwise—agency action."[311] The discussion of environmental impacts need only be "reasonably complete."[312] The duty to detail mitigation measures is not the same as detailing a mitigation plan.[313] Nor is a worst-case analysis mandated.[314]

The only procedure NEPA creates is the requirement to do an EIS.[315] It does not, for example, create a procedural duty for a public hearing. If, however, a separate statute, rule, or regulation requires a public hearing, then the NEPA statement can be attached to the already required public hearing.[316]

Marsh v. Oregon Natural Resources Council,[317] a companion decision to *Methow Valley*, included issues of mitigation and worst-case analysis. One of the environmental effects of constructing a proposed dam in Oregon would be an adverse effect on the migration and spawning of anadromous fish, which

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304 *Id.* at 352–53.
305 Most of the ski resorts in the West are on government land.
306 *See Methow Valley*, 490 U.S. at 351.
307 *See* S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior, 588 F.3d 718, 722 (9th Cir. 2009); *see also* AquAlliance v. U.S. Bureau of Reclamation, 287 F. Supp. 3d 969, 1051 (E.D. Cal. 2018).
308 *S. Fork Band*, 588 F.3d at 727.
309 *See Methow Valley*, 490 U.S. at 351.
310 *Id.*
311 *Id.*
312 *Id.* at 352.
313 *See id.* at 352–53.
314 *See id.* at 356.
315 *See id.* at 350.
316 *See* 40 C.F.R. § 1506.6(c)(2) (2018).
317 Marsh v. Or. Nat. Res. Council, 490 U.S. 360 (1989).

would be mitigated by a fish hatchery.[318] The Ninth Circuit held the EIS was defective because it did not include a complete mitigation plan or worst-case analysis.[319] The Supreme Court concluded, based on the same reasons set forth in *Methow Valley*, that a complete mitigation plan is not required under NEPA.[320]

The *Methow Valley* opinion contains a pithy comment: "NEPA merely prohibits uninformed—rather than unwise—agency action."[321] In an effort to assist with informed decision-making, the EIS must include details of mitigation measures, but the Supreme Court has held that a detailed mitigation plan is not mandated.[322]

J. Supplemental Impact Statements

Information can become available after an EIS is prepared. If the agency has to redo an EIS every time new information becomes available, it would probably never complete the process. Yet, the agency cannot be oblivious to new information.

CEQ has addressed this issue in its regulations. A supplemental impact statement is necessary if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[323] The arbitrary and capricious standard should govern the decision to prepare a supplemental impact statement.[324]

K. PANE and Fear

Fear, fear of the unknown, fear of new risks,[325] and fear of health and safety, have been a constant in nuisance litigation for centuries.[326] Fear is also an integral part of NIMBYism ("not in

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318 *See id.* at 367–68.

319 *See* Or. Nat. Res. Council v. Marsh, 832 F.2d 1489, 1500 (9th Cir. 1987), *rev'd*, 490 U.S. 360 (1989).

320 *Marsh*, 490 U.S. at 369.

321 *Methow Valley*, 490 U.S. at 351.

322 *Id.* at 352–53.

323 40 C.F.R. § 1502(9)(c)(1)(ii).

324 *See Marsh*, 490 U.S. at 376.

325 *See* Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1025 (1983).

326 *See* Koll-Irvine Ctr. Prop. Owners Ass'n v. Cty. of Orange, 29 Cal. Rptr. 2d 664 (1994) (fear of explosion of aviation fuel storage tanks at airport); Brown v. Petrolane, Inc., 162 Cal. Rptr. 551 (1980) (fear of LPG facilities); Nicholson v. Conn. Half-Way House, Inc., 218 A.2d 383 (Conn. 1966) (fear of ex-cons in neighborhood halfway house); Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981) (fear of toxic waste landfill); Balt. v. Fairfield Imp. Co., 39 A. 1081 (Md. 1898) (fear of leprosy); Bd. of Health of Ventnor City v. N. Am. Home, 78 A. 677 (N.J. Ch. 1910); Everett v. Paschall, 111 P. 879 (Wash. 1910) (fear of tuberculosis); Earl of Ripon v. Hobart (1834) 40 Eng. Rep. 65, 65 (fear of steam engine draining lowlands). *See generally* Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83 (1984).

my backyard"). It is often the underlying reason for opposition, even if it is not the legal theory advanced in litigation.

Fear entered into NEPA litigation in *Metropolitan Edison Co. v. People Against Nuclear Energy* ("PANE").[327] The Three Mile Island Nuclear Reactor 2 ("TMI 2") outside Harrisburg, Pennsylvania had a partial meltdown on March 28, 1979.[328] Fears existed of widespread radiation exposure in the greater Harrisburg area.[329] TMI 2 was decontaminated and removed. Finally, the remaining TMI 1 was ready to renew operations. The reopening of TMI 1 caused fear in the nearby residents.[330] They alleged "severe psychological health damage to persons living in the vicinity, and serious damage to the stability, cohesiveness, and well-being of the neighboring communities."[331]

The NRC refused to take evidence on PANE's contentions, while it had considered the physical effects of the restart, including the risk of a nuclear accident.[332] Suit was brought, claiming the NEPA Statement was inadequate because it did not include the analysis of mental distress.[333] The D.C. Court of Appeals held NEPA requires the NRC to evaluate "the potential psychological health effects of operating" TMI 1.[334]

The Supreme Court rejected the emotional distress argument.[335] A NEPA statement does not have to consider every impact or effect of the proposed action.[336] Focus is on the impacts and effects on the environment—the physical environment: "a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue."[337]

Justice Rehnquist analogized the situation to causation analysis in torts, using "but for" causal connection, and proximate cause; "like the familiar doctrine of proximate cause from tort law."[338] Justice Rehnquist, writing for the majority, cautioned that taking "environmental" out of context, giving it

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327 460 U.S. 766 (1983).
328 *See id.* at 768.
329 *See id.* at 768–69.
330 *See id.* at 769.
331 *Id.*
332 *Id.* at 770.
333 *See id.* at 769–70.
334 People Against Nuclear Energy v. U.S. Nuclear Regulatory Comm'n, 678 F.2d 222, 235 (D.C. Cir. 1982).
335 *See Metropolitan Edison Co.*, 460 U.S. at 775.
336 *See id.* at 776–77.
337 *See id.* at 772, 774.
338 *Id.* at 774.

the broadest possible interpretation, "might embrace virtually any consequence . . . that someone thought 'adverse.'"[339]

He held NEPA needs a relationship between the effect and the change in the physical environment caused by the major federal action.[340] He continued that even if the effect passes the "but for" test, the causal change may be too attenuated, and the harm may be too remote from the physical environment.[341] Thus, a reasonably close relationship should exist between a change in the physical environment and the effect at issue, like the doctrine of proximate cause in Tort.[342]

He may have thought causation analysis is a magic talisman for drawing the line. However, having taught Torts almost every year of my forty-eight years teaching law to date, I can clearly assert that causation analysis is the most incomprehensible subject. No definitive rules, standards, or guidelines exist for drawing the line between proximate and remote cause. Indeed, the Restatement (2nd) of Torts replaced "proximate cause" with "legal cause," which is equally undefinable.[343]

Justice Rehnquist also looked at the issue of fear and risk from a different perspective, noting that risk is pervasive in modern life.[344] PANE argued the psychological health damage flows directly from the risk of a nuclear accident.[345] Risk, though, is not an effect on the physical environment,[346] which is the focus of NEPA. Finally, if this fear and risk were to become a staple of NEPA analysis, then the time and resources necessary for a traditional NEPA analysis would be too limited.

L. Hypothetical NEPA Statements

The Navy was constructing ammunition and weapons storage facilities capable of storing nuclear weapons on Oahu.[347] However, the Navy refused to affirm or deny the storage of nuclear weapons.[348] It prepared an environmental assessment and concluded no EIS was necessary.[349] Actual storage of nuclear weapons is classified and thereby cannot be disclosed in a NEPA

339 *Id.* at 772.
340 *Id.* at 773.
341 *Id.* at 774.
342 *Id.*
343 RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW. INST. 1965).
344 *See Metropolitan Edison Co.,* 460 U.S. at 775.
345 *Id.*
346 *Id.* at 773.
347 Catholic Action of Haw./Peace Educ. Project v. Brown, 643 F.2d 569, 570 (9th Cir. 1980).
348 *Id.*
349 *Id.*

statement pursuant to the Freedom of Information Act ("FOIA").[350] Plaintiffs sought to enjoin the project until an EIS was prepared.[351] The Ninth Circuit held that the Navy had to prepare a hypothetical EIS as if nuclear weapons were stored at the site.[352]

The Supreme Court reversed.[353] It recognized the EIS process is subject to FOIA exemptions.[354] The Court recognized that materials which are protected from disclosure by the FOIA cannot be disclosed in a NEPA statement.[355] FOIA's purpose has been described as opening up the workings of the government to public scrutiny.[356] The first express exemption to FOIA is materials classified to protect national security.[357]

The Navy could prepare an EIS for internal purposes, but it could not be disclosed to the public. Justice Rehnquist wrote that a hypothetical EIS "is a creature of judicial cloth, not legislative cloth," which is not mandated by any of the statutory or regulatory provisions which were relied upon in the appellate opinion.[358]

The Court also cited *Kleppe* for the proposition that an EIS would not be necessary simply because the facilities were capable of storing nuclear weapons.[359] That a facility is capable of storing the nuclear weapons is not the same as an actual proposal to store them.[360] Therefore, where disclosure of information is exempted under the FOIA, a hypothetical EIS does not become a requirement of NEPA.[361]

V. REMEDIES: INJUNCTIVE RELIEF

The normal remedy under the APA is to reverse the administrative decision and remand the decision. An alternative remedy for ongoing operations is an injunction against the decision.

Injunctive relief developed in courts of equity. Injunctions are not automatic. *Weinberger v. Romero-Barcelo*[362] is an example of this premise. The Navy had long used Vieques Island off Puerto

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350 *Id.* at 571.
351 *Id.* at 570.
352 *Id.* at 572.
353 Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 147 (1981).
354 *Id.* at 144–46.
355 *Id.* at 143.
356 McGehee v. CIA, 697 F.2d 1095, 1108 (D.C. Cir. 1983).
357 *See* 5 U.S.C. § 552(b)(1)(A) (2016).
358 *Weinberger*, 454 U.S. at 141.
359 *Id.* at 146.
360 *Id.*
361 *See generally* F.L. McChesney, *Nuclear Weapons and "Secret" Impact Statements: High Court Applies FOIA Exemptions to EIS Disclosure Rules*, 12 ELR 10007 (1982).
362 456 U.S. 305 (1982).

Rico as a weapons training site.[363] The trial court found a violation of the Clean Water Act for discharging munitions into navigable waters without a permit, and ordered the Navy to seek a permit but refused to grant a permanent injunction.[364] The court of appeals reversed, mandating an injunction.[365] The tribunal reasoned the Clean Water Act removed equitable discretion.[366]

The Supreme Court reversed, holding discretion was available under the statute.[367] It held the trial court should apply the traditional equitable doctrine of balancing the equities.[368] An injunction is an equitable remedy that does not issue as a matter of course.[369] The basis of granting injunctive relief in federal court is irreparable injury and the inadequacy of legal remedies.[370] The Court directed the lower courts to balance the equities.[371] The Court cautioned that "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[372]

The Supreme Court subsequently held in *Amoco Production Co. v. Gambell*[373] that the conditions for a full injunction are essentially the same as for a preliminary injunction.[374] The differences are that for a preliminary injunction the plaintiff must show a substantial chance of success on the merits, whereas for the full injunction, the plaintiffs have won on the merits.[375]

The Court also reversed the Ninth Circuit's presumption of irreparable injury when the agency fails to thoroughly evaluate environmental impacts.[376] No such presumption exists:

> [A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. . . . "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[377]

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363 *See id.* at 307.
364 *See id.* at 307–08.
365 *See id.* at 310.
366 *See id.*
367 *Id.* at 311.
368 *Id.* at 319–20; *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987).
369 *See Weinberger*, 456 U.S. at 311.
370 *Id.* at 312.
371 *See id.* at 319–20.
372 *Id.* at 312.
373 480 U.S. 531 (1987).
374 *Id.* at 546 n.12.
375 *See id.*
376 *Id.* at 545.
377 *Id.* at 542 (quoting *Weinberger*, 456 U.S. at 313).

The non-NEPA *Weinberger* case was followed a decade later in the NEPA case of *Winter v. Natural Resources Defenses Council, Inc.*[378] A lawsuit was filed against the Navy for its ongoing sonar-training program, which allegedly harmed marine mammals.[379] The Navy issued an environment assessment that the training exercises would not have a significant effect on the environment.[380]

The district court issued an injunction pursuant to the Coastal Zone Management Act of 1972 and NEPA.[381] The case reached the Supreme Court after a fury of district court[382] and court of appeals decisions.[383] The lower courts held a preliminary injunction may be issued when plaintiffs show a strong likelihood of success on the merits, even if only a "possibility" of irreparable harm exists.[384]

Chief Justice Roberts wrote the majority opinion, holding for the Navy.[385] He reiterated the standard requirements for plaintiffs seeking preliminary injunctive relief: (1) likelihood of success on the merits; (2) likelihood of irreparable harm, should the injunction be denied; (3) whether the balance of equities weigh on behalf of the plaintiff; and (4) whether an injunction is in the public interest.[386]

He wrote that a preliminary injunction requires a showing that irreparable injury is likely in the absence of injunctive relief.[387] Significantly, any injury to plaintiffs is outweighed by the public interest.[388] Courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[389] Emphasis was placed on the national security needs of the sonar-training.[390] The Court recognized the great deference it gives the military on military matters.[391] The public interest in the form of military concerns outweighed plaintiffs'

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378 555 U.S. 7 (2008).
379 *See id.* at 14.
380 *See id.* at 16.
381 Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2008).
382 *E.g.*, Nat. Res. Def. Council v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).
383 *E.g.*, Nat. Res. Def. Council v. Winter, 518 F.3d 658 (9th Cir. 2008).
384 *Id.* at 696.
385 *See Winter*, 555 U.S. at 33.
386 *Id.* at 20.
387 *Id.* at 22. An important factor in the decision is that the training had been ongoing for forty years without problems. *Id.* at 21.
388 *Id.* at 23.
389 *Id.* at 24 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).
390 *See id.* at 26.
391 *Id.* at 24. The Supreme Court recognized the case involved "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which call for professional military judgments. *Id.*

environmental concerns in denying the preliminary injunction.[392] The Court saw "no basis for jeopardizing national security, as the present injunction does."[393] The majority then used the same reasoning to deny a permanent injunction, recognizing that an injunction remains a matter of "equitable discretion."[394]

The Supreme Court in *Monsanto Co. v. Geertson Seed Farms Co.*[395] reaffirmed the four-part test of *Winter*, rejecting the presumption that an injunction is the proper remedy for a NEPA violation, absent unusual circumstances.[396]

Some courts have held NEPA violations constituted irreparable injury in every case. Hence a balancing of the equities would be unnecessary.[397]

VI. NEPA'S EFFECTS

NEPA has created impacts both within the United States and beyond its borders. These effects can be categorized based on NEPA's global impacts, its ability to flush out bad environmental ideas, and how it has been harnessed by the NIMBY movement.

A. Global Impact

The United States has made two great contributions to global environmental protection. The first is the creation of national parks, starting with Yellowstone National Park in 1872.[398] The second is the adoption of NEPA, which mandates the preparation of environmental impact statements. CEQ lists thirty-three countries in which EIS laws have been adopted or pending.[399] In addition, sixteen states have adopted their variations of NEPA.[400] The adoption of NEPA has encouraged

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392 *See id.* at 26.

393 *Id.* at 33.

394 *Id.* at 32.

395 561 U.S. 139 (2010).

396 *Id.* at 156–57.

397 *See, e.g.*, Sierra Club v. Marsh, 872 F.2d 497, 505 (1st Cir. 1989).

398 *See* Thomas Moran, *Birth of a National Park*, NAT'L PARK SERV. (Sept. 17, 2019), http://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm [http://perma.cc/5YLH-WARF].

399 *See International Environmental Impact Assessment*, NEPA.GOV, http://ceq.doe.gov/get-involved/international_impact_assessment.html [http://perma.cc/S4LG-QTTG] (last visited Sept. 20, 2019). The list also included Antarctica, the Arctic, Catalonia, Europe, and the United Nations. *Id.*

400 *See States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV, http://ceq.doe.gov/laws-regulations/states.html [http://perma.cc/6NT7-PSQ6] (last visited Sept. 20, 2019); *see also State environmental policy acts*, BALLOTPEDIA, http://ballotpedia.org/State_environmental_policy_acts [http://perma.cc/ECC5-9DMD] (last visited Sept. 20, 2019).

countries around the global to contribute to environmental protection through the adoption of their own versions of NEPA.

B. Flushing Out Bad Ideas

We can easily think of the environment in broad terms, such as clean air, clean water, and national parks, but NEPA also applies to narrower issues. Specifically, NEPA's information requirement can draw out poor decisions. Paraquat spraying, as discussed above, was one of them.[401] Another was a channelization case.

The Soil Conservation Service ("SCS") had a policy of reducing flood threats by channelizing narrow, winding streams. It would straighten and gouge them out, thereby facilitating flow in flooding events.[402] We now understand that channelization has severe environmental consequences, including the loss of wetlands and deterioration of the stream banks.[403]

The proposal in one case was to stabilize the stream banks by planting kudzu on them.[404] Kudzu had become an infamous exotic vine that was depicted as taking over the South.[405] The EIS did not disclose how the agency planned to control the Kudzu's growth and the project's possible adverse effects downstream.[406]

C. The NIMBY Effect[407]

NEPA quickly became a main weapon of NIMBYs because of its universality.[408] NEPA buys time—an important tool for opponents for the proposed action. New adverse information may be uncovered in the interim. Public opposition could mount. Politicians could weigh in. The costs of the delay could result in the project being abandoned. Construction costs historically rise faster than the underlying rate of inflation. Escalating costs can torpedo a project. Delay also provides time for opponents to

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401 *See supra* Part IV(F).

402 I was told while teaching at Ohio Northern in rural Ohio that the SCS also placed tiles under farmland to, again, facilitate runoff.

403 *See* David Shankman & Larry J. Smith, *Stream Channelization and Swamp Formation in the U.S. Coastal Plain*, 25 PHYSICAL GEOGRAPHY 22 (2004).

404 *See* Nat. Res. Def. Council v. Grant, 355 F. Supp. 280, 288 (E.D. N.C. 1973).

405 The joke in the South is that if you stand still long enough, Kudzu would grow up you. *See* Bill Finch, *The True Story of Kudzu, the Vine That Never Truly Ate the South*, SMITHSONIAN.COM (Sept. 2015), http://www.smithsonianmag.com/science-nature/true-story-kudzu-vine-ate-south-180956325/ [http://perma.cc/8HSF-HMHB].

406 *Grant*, 355 F. Supp. at 288.

407 For a general NIMBY discussion, see Ori Sharon, *Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism*, 49 ENVTL. L. REP. 10264 (2019), and Denis Binder, *NEPA, NIMBYs and New Technology*, 25 LAND & WATER L. REV. 11 (1990).

408 For a general discussion of NIMBISM, see Denis Binder, *Cutting the NIMBIAN Knot: A Primer*, 40 DEPAUL L. REV. 1009 (1991).

acquire additional negative information and promote a public campaign against the proposal.

The Tellico Dam case illustrates the combination of NEPA and the Endangered Species Act.[409] The NEPA process bought time for new developments, which was the discovery of the Snail Darter, an endangered species. An injunction had been issued against the dam until an adequate EIS was prepared. The court was about to lift the injunction[410] when the Snail Darter was discovered downstream from the dam.[411] The Endangered Species case reached the Supreme Court with Chief Justice Burger issuing a strong opinion upholding the broad sweep of the statute:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species . . . ."[412]

An act of Congress was required to complete the dam.[413]

Litigation can lead to delay, and delay can lead to cancellation. A classic example is the end of the Westway highway program in Manhattan.[414] The existing highway on the west side of Manhattan had deteriorated. Much of it was razed. Westway, a new highway from the Battery to 43rd Street, was planned to replace it. Planning began in 1972. The final impact statement was issued on January 4, 1977, with federal funding approved. The highway would include partial filling of the Hudson River, which could adversely affect the striped bass population.[415] Biological studies continued into 1981. Litigation ensued. Westway was doomed.

The district court enjoined any further action on Westway that would affect the bed or waters of the Hudson River until a

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409 For a history of the Snail Darter litigation, see ZYGMUNT J. B. PLATER, THE SNAIL DARTER AND THE DAM (2013). Professor Plater was one of the lawyers representing the plaintiffs throughout the long saga.

410 *See* Envtl. Def. Fund v. Tenn. Valley Auth., 371 F. Supp. 1004, 1015 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

411 *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 158 (1978).

412 *Id.* at 173 (quoting 16 U.S.C. § 1536 (1976)).

413 PLATER, *supra* note 409, at 322.

414 For a history of Westway, see Sam Roberts, *Battle of the Westway: Bitter 10-Year Saga of a Vision on Hold*, N.Y. TIMES (June 4, 1984), http://www.nytimes.com/1984/06/04/nyregion/battle-of-the-westway-bitter-10-year-saga-of-a-vision-on-hold.html [http://perma.cc/BQ3E-G3VJ].

415 *Id.*

supplemental EIS was prepared.[416] The Second Circuit affirmed on most of the issues.[417] The project was dropped shortly thereafter.[418]

EISs, especially under California's CEQA statute, are used as a weapon to block homeless housing, a critical problem in California.[419] Overall, NEPA has become a tool of the NIMBY movement.

VII. CLIMATE CHANGE[420]

One commentator began his article by writing, "Global climate change is the preeminent environmental concern of the modern era."[421] The NRC five decades ago successfully argued it did not need to consider the novel concept of energy conservation. However, energy conservation quickly became a staple in NEPA statements.

Two premises exist with climate change. The first is that almost any human activity of a substantial nature will have an effect, ranging from infinitesimally small to substantial, direct, indirect, and cumulative on the environment. The second is that the climate and weather is global.

The effects of energy development can be both direct and indirect. For example, oil exploration uses energy. The production of oil and gas produces pollution. Transportation of these fossil fuels will produce greenhouse gases ("GHGs"). Downstream consumption fuels consumers, industry, business, and transportation, all contributing directly or indirectly to GHGs. Coal will generate energy, especially electricity, but is also critical in manufacturing steel.

A 1990 case reached a limited view of climate change.[422] That holding did not stand for long. The Ninth Circuit in the 2008 case

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416 *See* Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1016 (2d Cir. 1983).

417 *See id.*

418 *See* Sam Roberts, *The Legacy of Westway: Lessons From Its Demise*, N.Y. TIMES (Oct. 7, 1985), http://www.nytimes.com/1985/10/07/nyregion/the-legacy-of-westway-lessons-from-its-demise.html [http://perma.cc/ZP5Y-EGJY].

419 *See* Liam Dillon & Benjamin Oreskes, *Homeless shelter opponents are using this environmental law in bid to block new housing*, L.A. TIMES (May 15, 2019, 5:00 AM), http://www.latimes.com/politics/la-pol-ca-ceqa-homeless-shelter-20190515-story.html [http://perma.cc/7663-24WU].

420 *See generally* Bradford C. Mank, *Civil Remedies*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 183 (Michael B. Gerrard ed., 2007); Nicole Rushovich, *Climate Change and Environmental Policy: An Analysis of the Final Guidance of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 27 B.U. PUB. INT. L.J. 327 (2018).

421 Aaron J. Kraft, Comment, *NEPA and Climate Change: Beneficial Applications and Practical Tensions*, 25 J. ENVTL. L. & LITIG. 559, 560 (2010).

422 *See* City of L.A. v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 484, 490 (D.C. Cir. 1990). The D.C. Circuit held the theoretical increase greenhouse gas concentrations in the corporate average fuel economy (CAFÉ) standards was insufficient to trigger an EA analysis. *Id.* at 482.

of *Center for Biological Diversity v. National Highway Traffic Safety Administration* held the impacts of GHGs are part of EISs.[423] The court held that even though climate change is a global phenomenon "that includes actions that are outside of [the agency's] control[,] . . . [it] does not release the agency from the duty of assessing the effects of *its* actions on global warming . . . ."[424] As with energy conservation, climate change has become a factor in NEPA consideration.

NEPA has been heavily involved in energy development projects in its fifty years of existence. Numerous lawsuits were brought against proposed nuclear power plants[425] and dams from the beginning. The D.C. Circuit was in a running battle with the Supreme Court over the safety of nuclear power.[426]

NEPA is playing a critical role with climate change today as an informational source. CEQ issued guidance on climate change and NEPA and stated, "Climate change is a fundamental environmental issue, and its effects fall squarely within NEPA's purview."[427]

Climate change is at the forefront of environmental policy today, and has thus quickly become embedded in the NEPA process. Climate change does not change the NEPA legal analysis. The standard NEPA issues present on federal government action remain: (1) is a NEPA Statement required; (2) if yes, then is the NEPA Statement adequate; and (3) has the agency taken a hard look at the climate change implications and effects of the proposed action?

An EIS discussion of climate change satisfies the procedural information requirement of NEPA for providing useful information to the decision makers and the public. The agency needs to take a "hard look" at the issue, but it does not mandate a rejection of the proposal because of an effect on climate change.

The CEQ guidelines[428] provide that the EIS should consider: (1) the potential effects of the proposed action on climate change, such as carbon emissions and, if applicable,

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423 538 F.3d 1172, 1179 (9th Cir. 2008).

424 *Id.* at 1217; *see also* Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 533 (8th Cir. 2003).

425 For an overview of the nuclear energy cases, see Binder, *supra* note 407, at 20–30.

426 *See id.*

427 Christina Goldfuss, *Memorandum for Heads of Federal Departments and Agencies: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, NEPA.GOV 1, 2 (Aug. 1, 2016), http://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf [http://perma.cc/Q5MU-4SVP]; *see also* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions, 81 Fed. Reg. 51,866 (Aug. 5, 2016).

428 For a discussion of the CEQ guidelines, see Rushovich, *supra* note 420, at 347–48.

carbon sequestration; and (2) the effects of climate change on the proposed action and its environmental impacts. However, the CEQ Climate Change Guidance was rescinded by President Trump on March 28, 2017.[429]

Perhaps one can fairly assert that, just as energy conservation became a standard alternative to consider in EISs, so too climate change is an impact on the human environment to be included in an EIS. For example, one problem with projecting future impacts of climate change is to rely on past history without taking into account foreseeable climate, such as by projecting future stream flows.[430]

The key in NEPA statements is to include climate change in the statement and take a hard look at the alternatives and the implications on the human environment.[431] The hard look includes the direct, indirect, and cumulative consequences.[432] Energy development and transportation, especially with fossil fuels, is a prime example of potential for direct, indirect, and cumulative impacts. A common statement by agencies is that the project's effect on climate change is "infinitesimally small" because climate change is a global problem, thereby making their contributions to climate change minimal.[433]

A district court opinion recognized a hard look must be taken of an EA or EIS in oil and gas leasing, which includes the reasonably foreseeable irretrievable commitment of resources.[434] The Eighth Circuit in *Mid States Coalition for Progress v. Surface Transportation Board* held an EIS for a rail line to transport coal was inadequate because it did not discuss the indirect impacts, although it discussed the direct impacts.[435]

NEPA does not necessitate a change in the decision to favor reducing the climate change impacts over the project.[436] As one case said, the question is not whether the agency made the

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429 *See* Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

430 *See* Wild Fish Conservancy v. Irving, 221 F. Supp. 3d 1224, 1233–34 (E.D. Wash. 2016).

431 *See, e.g.*, WildEarth Guardians v. U.S. Forest Serv., 120 F. Supp. 3d 1237, 1247 (D. Wyo. 2015) (reviewing federal leasing of coal tracts in Powder River Basin—portions of which are in the Thunder Basin National Grassland).

432 *See* WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 53 (D.D.C. 2019).

433 *See, e.g.*, Bark v. U.S. Forest Serv., 2019 U.S. Dist. LEXIS 101649, at *29 (D. Or. 2019), *appeal docketed*, No. 19-35665 (9th Cir. Aug. 7, 2019).

434 *See Zinke*, 368 F. Supp. 3d at 64.

435 345 F.3d 520, 550 (8th Cir. 2003).

436 *See, e.g.*, Gov't of Manitoba v. Zinke, 273 F. Supp. 3d 145, 152 (D.D.C. 2017). The project was the long-planned diversion of water from Lake Sakakawea and the Missouri River to thirsty communities in North Dakota. *Id.* at 150. The waters will cross the Basin Divide with the risk of co-mingling waters of the Missouri River Basin and the Hudson Bay Basin. *Id.*

correct decision, but whether it took a hard look at the environmental aspects of the reasonable consequences.[437]

A series of district court opinions hold the emission of greenhouse gases is a factor to be considered in indirect and cumulative impacts.[438] These EAs and EISs necessitate a hard look at the greenhouse gas emissions, which means the Bureau of Land Management should have estimated the cumulative GHG emissions from the leasing program,[439] as well as downstream emissions.[440] GHGs from proposed fossil fuel developments, such as oil and gas or coal, should almost automatically be a major component of NEPA statements.

VIII. FAILURE TO FOLLOW THE NEPA

The SCS[441] prepared an impact statement to restore the Village of Ogunquit, Maine's eroding mile long white sand dune.[442] The SCS was unable to dredge sufficient wind-blown beach sand from the estuary to restore the dune. It therefore used inland, coarse, yellow sand and gravel rather than the fine, white quartz sand native to the Ogunquit dune.[443] The result was labeled "an ugly yellow bunker."[444] Neither the draft nor final EIS mentioned the use of inland sand. The EIS failed to describe "the fill to be used, the environmental consequences of using noncompatible materials, and the possible alternatives to their use."[445]

The court of appeals affirmed the district court opinion that held no remedy exists for violating an EIS.[446] Relief is unavailable under NEPA for "post-completion relief where hindsight reveals inadequacies in an environmental impact statement."[447] The appellate court was concerned that allowing such relief would flood the courts with belated litigation for

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437 *Id.*

438 *See* Wilderness Workshop v. U.S. Bureau of Land Mgmt., 342 F. Supp. 3d 1145, 1156–58 (D. Colo. 2018); High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); *see also Mid States Coal.*, 345 F.3d at 549 (evaluating future coal combustion impacts from extension of railroad line).

439 *See* WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 68–69 (D.D.C. 2019).

440 *See id.* at 71–75; *see also* San Juan Citizens All. v. U.S. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1242–44 (D.N.M. 2018).

441 The SCS is now the Natural Resources Conservation Service (NRCS). USDA, *More Than 80 Years Helping People Help the Land: A Brief History of NRCS*, http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392 [http://perma.cc/C5UF-GHPB].

442 Ogunquit is one of the Maine coast beach cities attractive to tourists.

443 *See* Ogunquit Vill. Corp. v. Davis, 553 F.2d 243, 244 (1st Cir. 1977).

444 *Id.*

445 *Id.*

446 *See id.* at 247.

447 *Id.* at 245.

failure to completely comply with an EIS.[448] The court could also not come up with standards to decide those cases.[449] However, the court could easily have done so in the Ogunquit case, in that the project was authorized for $804,000, but was completed for $443,015—a $400,000 savings by using non-compliant sand.[450] Other sources were rejected because of cost.[451]

Similarly, once federal involvement is over, the role of the EIS is over.[452] The appellate court was worried about the "implications of affording post-completion relief where hindsight reveals inadequacies in an environmental impact statement."[453] It is quite possible that large projects may not perfectly comply with every detail of an impact statement. Post-completion discrepancies could lead to prolonged litigation and large expenditures of public funds.[454]

A different result was reached in *Oregon Natural Resources Council v. U.S. Bureau of Land Management*.[455] The timber harvest had already occurred, but the court held a NEPA Statement could still lead to mitigation measures.[456]

IX. CONCLUSION

NEPA has often been referred to as the Magna Carta of United States environmental protection.[457] However, it is less than that because of its limitations as a procedural rather than substantive statute. Nor is NEPA a panacea for all of America's environmental problems. However, the days of "Damn the Environment; Full Steam Ahead" are over.[458]

The statute does not create a common law on environmental protection. Nor does it mandate a particular result. It is not even an action forcing a pro-environment decision. NEPA is further limited in that a federal action must be involved. It does not cover purely private actions or state actions. It is, though, a statute that

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448 *See id.*

449 *See id.* at 246.

450 Ironically, I was on Ogunquit's beach in late fall in 1978 and was oblivious to any problems or litigation.

451 *Ogunquit*, 553 F.2d at 244.

452 *See* Gettysburg Battlefield Pres. Ass'n v. Gettysburg Coll., 799 F. Supp. 1571, 1577–78 (M.D. Pa. 1992); Envtl. Rights Coal., Inc. v. Austin, 780 F. Supp. 584, 587–88 (S.D. Ind. 1991).

453 *Ogunquit*, 553 F.2d at 245.

454 *Id.*

455 470 F.3d 818 (9th Cir. 2006).

456 *See id.* at 820–23.

457 *See, e.g.*, Blumm & Nelson, *supra* note 83, at 5.

458 This phrase has commonly been used to refer to the mentality that business considerations traditionally prevailed over environmental considerations. *See, e.g.*, *Kent Gilbreath*, INDUSTRY'S ENVIRONMENTAL ATTITUDES, 14 EPA J. 18 (1988).

applies throughout the federal government. It is not a pervasive statute of environmental protection, but provides a means through which information of environmental decision-making in almost all types of federal action affecting the environment must be considered. It is not an all-purpose, environmental panacea. It is a means to facilitate environmental protection through other means, such as statutes, regulations, and publicity. NEPA is a mandate of environmental full disclosure for major federal actions substantially affecting the human environment for the benefit of decision makers and the public.

NEPA is a critical tool in furthering public debate on environmental issues not otherwise covered by specific federal statutes or regulations. It can complement existing regulatory statutes and regulations, as well as shape the tone of a debate; but it cannot, by itself, dictate the outcome. As the Supreme Court held in *Methow Valley*: "NEPA merely prohibits uninformed—rather than unwise—agency action."[459] NEPA and the FOIA have come a long way in forcing the federal government to disgorge unpleasant information. NEPA's information provision is a major means of preventing the government from keeping negative facts from the public.[460]

NEPA requires decision makers to take a hard look at the environmental effects of a proposal and then justify them. That is the hard look.

The negative aspect of NEPA is that the NEPA process serves as a NIMBY tool for delay. Delay buys time. Construction costs historically rise faster than the underlying rate of inflation. Escalating costs can torpedo a project. Delay also provides time for opponents to acquire additional negative information and promote a public campaign against the proposal.

The Supreme Court has consistently held NEPA is a procedural, environmental full-disclosure statute. It is not thought to be merely a procedural statute. Failure to follow the procedural requirement of a valid EIS can result in substantial delays, up to years, in the project moving forward. The statute has no fixed deadlines for implementation and judicial review.

However, NEPA is not procedural in a narrow, ministerial sense that the judge checks if precise dates and filings requirements have been met. Judges have discretion in reviewing

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459 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

460 While not a focus of this paper, FOIA is also a vehicle for obtaining government information on a broad basis, unless limited by an express exclusionary provision in the statute. Freedom of Information Act, 5 U.S.C. § 552(b)(3) (2012).

a NEPA Statement. Discretion as to the necessity and adequacy of the NEPA Statement lies with the judiciary. Their decisions determine if the federal action proceeds.

NEPA does not repeal by implication any other federal statute. Nor does it create any new procedures, such as a public hearing, if none is otherwise provided. The analysis of NEPA cases show that EISs do not have to be perfect, and instead are judged by the rule of reason approach.

The genius of NEPA is its flexibility. It does not need amendments to apply to new environmental issues. It was involved in substantial litigation over nuclear energy in its early years, and it is equally applicable today to fossil fuels and climate change.